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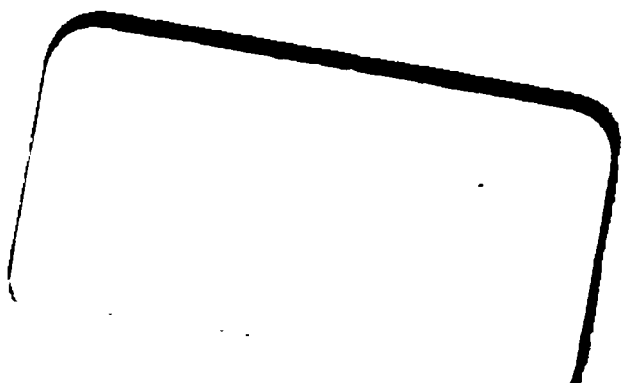
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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOL. XLIX.

REPORTED BY

MARTIN L. NEWELL

OF THE SPRINGFIELD BAR

CHICAGO

CALLAGHAN & COMPANY

1894

Entered according to act of Congress, in the year 1894,
BY CALLAGHAN & COMPANY,
In the office of the Librarian of Congress, at Washington, D. C.

June 23, 1894.

Stereotyped and Printed
by the
Chicago Legal News Company.

OFFICERS OF THE APPELLATE COURTS OF ILLINOIS

DURING THE TIME OF THESE REPORTS.

MARTIN L. NEWELL, *Reporter*, Springfield.

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 ALFRED SAMPLE, *Justice*, Paxton.
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* Elected Justice of the Supreme Court.

† Assigned in place of Justice Phillips.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1892.

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Toledo, St. L. & K. C. R. R. Co. v. Clark.

1. *Railroads—Negligence—Construction.*—As a question of fact a jury may well consider a frog-like arrangement of a rail, movable by a switch, on a city sidewalk, a faulty construction, and having a space between the fixed rail and the planking sufficient to catch and hold the foot of a person passing over it, culpable negligence.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, WILEY & NEAL, ATTORNEYS, CLARENCE
BROWN, OF COUNSEL.

For the plaintiff to maintain this action it must appear that at the time of the accident he was exercising ordinary care for his own safety. C., B. & Q. R. R. Co. v. Thomas. L. Johnson, 103 Ill. 512; C. & N. W. R. R. Co. v. Sweeney, 52 Ill. 325; Galena & C. U. R. R. Co. v. Jacobs, 20 Ill. 478; C., B. & Q. v. Hazzard, 26 Ill. 373.

A party can not speculate on his life and try chances of passing before a moving engine. W., St. L. & P. Ry. Co. v. Weisbeck, 14 Brad. 525.

It has been repeatedly held by our Supreme Court that it is negligence such as to preclude a recovery, for a person to step onto a railroad track without looking to see if a train be approaching. C. & N. W. Ry. Co. v. Dimick, 96 Ill. 42; C. & A. R. R. Co. v. Robinson, 9 Brad. 89; St. L., A. & T. H. R. R. Co. v. Plymacer, 9 Brad. 300; C., B. & Q. R. R. Co. v. Damerell, 81 Ill. 450; C. & R. I. R. R. Co. v. Still, 19 Ill. 499; G. & C. U. R. R. Co. v. Dill, 22 Ill. 265; C. & A. R. R. Co. v. Gretzner, 46 Ill. 82; T. P. & W. R. R. Co. v. Riley, 47 Ill. 515; St. L., A. & T. H. R. R. Co. v. Manly, 58 Ill. 300; C. & A. R. R. Co. v. Jacobs, 63 Ill. 179; C., B. & Q. R. R. Co. v. VanPatten, 64 Ill. 516.

APPELLEE'S BRIEF, HUGH & HAYES, ATTORNEYS.

It is a rule of law, that by a verdict of a jury upon a question of fact alone, when fairly submitted, the successful party obtains certain rights, which are recognized by the law, and that such verdict must stand, although it may appear to be against the weight of the evidence, unless it is apparent upon the face of the record that the jury were actuated by passion or prejudice. Shelton v. O'Riley, 32 App. 641; Plummer v. Rigdon, 78 Ill. 222; Miller v. Balthasser, 78 Ill. 305; L. E. & W. Ry. v. Zoffinger, 107 Ill. 202.

OPINION OF THE COURT, PLEASANTS, P. J.

Appellee recovered judgment below on a verdict for \$1,000 damages for the loss of his right foot, charged to have been caused by the negligence of appellee.

He was a single man, thirty-one years of age, residing six miles west of the city of Charleston. He went to the city on the morning of December 10, 1890, and spent the day there. About nine o'clock in the evening, on his way to take the train for home, while passing over the track of appellant on the sidewalk of Railroad street, an engine, coming from the shops, in charge of an assistant hostler as engineer and a man who worked about the shops as fireman, ran upon him and crushed his foot, which had to be amputated. He was going by the usual route from the public square to the depot.

The street runs east and west, parallel with the track of the I. & St. L. Ry. and nearly parallel with that of appellant, which runs northeast and southwest, crossing the former at a point east of the place of the accident, variously stated by the witness at eighty to a hundred and thirty feet, and the south sidewalk, diagonally, at a small angle. Appellant was walking west, carrying two bundles. His statement is, that when a few steps from the crossing, he looked north and saw the engine, then about at the crossing of the I. & St. L. track, and supposing it was moving on that track, did not look to see it again until, walking on, his foot was caught and held, beyond his power to extricate it, in a hole between appellant's south rail and the planking on its north side. The engine was moving without any headlight, at a rate of four to five miles an hour. Appellee says he heard no bell, or other warning of it. He thinks his foot went into the hole six inches. He stated that he had passed over that crossing a hundred times, probably, but never noticed it particularly, or that there was anything wrong about it; that if he had seen the hole he could easily have stepped over it, and that if he had not stepped into it, he would have passed the crossing in ample time to avoid the collision.

On behalf of the defense it was claimed and evidence offered tending to prove that the bell was ringing; that the engine was moving, for some distance before it reached the sidewalk, so nearly along side of him that if he had turned his eyes north he must have seen the situation; that he was intoxicated at the time, and stupidly stepped on the crossing immediately before the collision; that the flangeway, into which he said he put his foot, was only three inches or less in width; that his shoe, on the trial, measured four, and that when the accident occurred he was wearing overshoes.

As to each of these claims, except the last two—the measurement of his shoe, and the fact that he also wore overshoes—there was evidence to the contrary. Elijah Sewell, a resident of Charleston, familiar with the crossing,

and in the employ of the company as brakeman and switchman, speaking of the space between the rail and the plank, says: "The plank lays kind o' wedge fashioned with the rail, which made it five or six inches at the south end, and about three at the north;" and that he made the experiment and found that his foot would slip in there. Madigan, the roadmaster, says the rail on the south side was two and a half or three inches from the plank, but varied a little where the plank was worn from the flange of the wheel.

It appears, also, that there was a switch stand a few feet from the south end, and movable rails laid in the walk. Madigan says: "The two rails, I think, extend into the walk, probably a foot or so from the north side, and the movable rail from the south comes across the walk to meet that. The switch stand is at the south side of the walk. These rails are moved by the switch stand, back and forth across the sidewalk, and when the rails are moved to the south, so as to connect with the Y, it would leave a space on the north side of the south rail of six or seven inches."

Two undisputed facts, which may have turned the scale in the mind of the jury, were that the plaintiff was on the track and only his foot was injured. The wheel that crushed it was running on the south rail—the one he would have passed first—and it is not easy to account for his injury, except upon his own statement, that finding his foot fast, he threw his body backward and outward from the track. A man stupefied by liquor to the extent it is claimed he was, usually leans and lunges forward; and had he got so far as the south rail when the engine struck him, it seems most probable that his body would have fallen between the rails; and if his foot had not, in fact, been fast, that the falling of his body outward, before the collision, would have cleared it also. A further and fair inference would be that his injury was caused by the catching of his foot, and not by his attempt to cross the track, which would have been accomplished in a moment.

The jury might well consider this frog-like arrangement

McPherson Nat. Bk. v. Velde.

of a movable rail, on a city sidewalk, faulty construction, and the leaving a space between the fixed rail and the planking, sufficient to catch and hold a foot, culpable negligence.

The record presents only questions of fact, and it is unnecessary to make further reference to the evidence in order to show that the verdict was fairly supported.

We see no material error in any ruling of the court. The judgment must therefore be affirmed.

McPherson National Bank v. Habbe Velde et al., Surviving Partners, etc.

1. *Promissory notes—Indorsement and Guaranty.*—The following indorsement upon a promissory note—"for value received — guarantee the payment of the within note at maturity," made by the payee thereof before maturity, and prior to the delivery of the note to a third person, operates as an assignment as well as a guaranty, and is enforceable in favor of any legal holder of the note.

2. *Promissory Notes—Restrictive Indorsements.*—The holder of a promissory note made the following indorsement thereon, viz., "Pay W. H. C., cash, or order for collection, and return," and sent it to the bank of which W. H. C. was cashier, for collection. A few days later the holders received from the bank, the following, viz.: * * * "We enclose our draft, \$395.97, in payment of coll. No. 8943, on Bonney, sent us July 22. This includes face and interest at 8 per cent, less our charges of \$1.00. Don't release chattel mortgage, as we still hold the note unpaid. By mistake our collection clerk left the coll. off the protest list, and it was not protested, but I think the security is ample to pay the obligation." *It was held* that the indorsement by the holder to the bank was restrictive, and was for collection merely. but that the action of the bank and the statement in its letter, when assented to by the acquiescence of the holder, amounted to a purchase of the paper and gave the bank all the rights of a general holder, including the right to enforce the guaranty. The restrictive indorsement may be treated as stricken out, and the bank regarded as any other holder under an indorsement in blank.

Memorandum.—Action of appeal from a judgment rendered by the Circuit Court of Tazewell County; the Hon. NATHANIEL W. GREEN, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, McLAUGHLIN & W. S. KELLOGG,
ATTORNEYS.

The note being unpaid and belonging to the plaintiff, the contract of the guarantors was still in force, and they were liable to the plaintiff as the legal holder of the note. We refer the court to the case of *Ketchum v. Duncan et al.*, 96 U. S. 659, 675, as sustaining this position, which we take to be the vital point in the case, and upon which defendants rely.

As to the nature of the contract of guaranty, see *Gage v. Nat. Bank of Chicago*, 79 Ill. 62. The contract of guaranty on note continues in full force so long as the note has life and vitality. *Parkhurst v. Vail*, 73 Ill. 343. Where the payee of a note indorses upon it, "I guarantee the payment of the within note," that will operate also as an assignment of the instrument. *Childs v. Davidson*, 38 Ill. 437; cites and approves, *Heaton v. Hulbert*, 3 Scam. 489, and *Judson v. Gookwin*, 37 Ill. 286. See also leading cases on Bills of Exchange and Promissory Notes, by Redfield and Bigelow, p. 111, note under case of *Brown v. Butchers and Drovers' Bank*, citing *Partridge v. Davis*, 20 Vt. 499, and *Leggett v. Raymond*, 6 Hill, 639.

The indorsement for collection merely, and for no other purpose, does not transfer title. *Best v. Nokomis Natl. Bank*, 76 Ill. 610.

Plaintiff may strike out a blank indorsement upon a promissory note payable to order on trial of suit brought on note. *Parks v. Brown*, 16 Ill. 454, and note. The note being indorsed in blank passed by mere delivery and the holder had a right to demand payment, or to make it payable to himself. *Palmer v. Marshall*, 60 Ill. 290.

And a holder of a note may always strike out a special indorsement and bring suit under a blank indorsement. 2 Daniel's Neg. Inst. 233 and 234, Sec. 1198.

WM. DON MAUS, attorney for appellees.

OPINION OF THE COURT, WALL, J.

On the 21st of February, 1891, B. S. Bonney, of McPherson, Kan., made and delivered his promissory note to the appellees by which he promised to pay to them, by their firm name of "Pekin Plow Co.," the sum of \$381.72 on the 1st of August following. Before maturity the appellee placed the following indorsement on the note: "For value received * * * guarantee the payment of the within note at maturity. Pekin Plow Co.," and discounted the note with Teis, Smith & Co., bankers of Pekin, Ill. These bankers then sent the note to the appellant bank with the following indorsement: "Pay W. H. Cottingham, cash, or order for collection, and return." On the 24th of August, 1891, Teis, Smith & Co. received from appellant bank a draft for the amount of note and interest, less charges, one dollar. The letter inclosing the draft read as follows:

"We enclose our draft, \$395.97, in payment of coll. No. 8943, on Bonney, sent us July 22. This includes face and interest at 8 per cent, less our charges of \$1.00. Don't release chattel mortgage, as we still hold the note unpaid; by mistake our collection clerk left the coll. off the protest list, and it was not protested, but I think the security is ample to pay the obligation. I remain very resp'y, Elmer Williams, Cash'r."

Teis, Smith & Co. appropriated the proceeds of the draft, made no response to the letter and took no further action in regard to the matter. In August, 1892, the appellant bank brought the present action against the appellees to recover the amount of said note on said guaranty. The case was tried before the court without a jury, and judgment was rendered for the appellees.

The indorsement by the appellees operated as an assignment as well as a guaranty. *Heaton v. Hurlbert*, 3 Scam. 489; *Childs v. Davidson*, 38 Ill. 437.

The guaranty was enforceable in favor of any legal holder of the note. The undertaking was absolute and unconditional.

The indorsement by Teis, Smith & Co., to the appellant, was restrictive, and was for collection merely. The action

of appellant and the statement in their letter, when assented to by the acquiescence of Teis, Smith & Co., amounted in effect to a purchase of the paper, and gave appellant all the rights of a general holder, including the right to enforce the guaranty.

There can be no other meaning attached to the action of the parties. The restrictive indorsement may be treated as stricken out, and the appellant may be regarded as any other holder under an indorsement in blank. It was unnecessary to fill the blank, for the mere act of suing upon it by the holder shows his intention to treat the indorsement as made to himself. Daniel on Negotiable Inst., Sec. 1194-8; Palmer v. Marshall, 60 Ill. 290.

The question is as to the effect of the transaction between Teis, Smith & Co. and the appellant. In our opinion the result was to invest the latter with all the rights of the former. If this is the correct view of the matter, the appellant was entitled to a recovery.

The judgment will be reversed and the cause remanded.

Green v. Stevens.

1. *Trespass to Real Estate—Highways.*—When a person fences in a part of the highway he is liable to a penalty, and the fence as an obstruction may be removed by the public officials or by a private citizen.

2. *Highways—Encroachments by Fencing—Acceptance and Dedication, etc.*—If, when a man owning the land adjacent to a highway, encroaches upon it by fencing, he gives to the public another way outside of his fence connecting with the road, the way so given may be accepted by the public, and in such case there will be as to such portion, a public highway it by dedication. A road so acquired will be just as binding on the landowner as though it had been laid out in the first instance by the authorities, and the owner can not thereafter withdraw it.

3. *Dedication—Lands of Minors Dedicated by Occupant, etc.—Estoppel, etc.*—Where a person, not the owner of lands which were adjacent to a highway, changed the location of the highway by moving fences, etc., and the minors, in whom the title of the lands was vested, acquiesced in such change and re-location after they became of age,

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and sold the lands to another. *it was held* that they were bound by the original act of re-location as to all rights acquired by the public by reason thereof.

Memorandum.--Trespass. Appeal from the Circuit Court of Greene County; the Hon. LYMAN LACEY, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

APPELLEE'S STATEMENT OF THE CASE.

Appellee sued appellant and one Anderson, in trespass, for damages resulting to him from the act of the defendants in cutting and removing his fences.

The appellant pleaded the general issue, but on the trial, the cutting and removal of plaintiff's fences, as charged, and that he was damaged thereby, was not denied. Special pleas in justification of the cutting and removal of the fences, on the ground that the *locus in quo* in each instance was a public highway, were filed.

The theory of appellant upon the trial, was that the appellee's fences were obstructions upon a public highway, and as such were lawfully cut and removed, and to this point his evidence was directed.

APPELLANT'S BRIEF, WITHERS & RAINEY AND W. C. SCANLAND, ATTORNEYS.

Upon the question that a road was laid out and established, the record of the proceedings of the commissioners, the report of the viewers and the order establishing the public highway, introduced in evidence by the appellant in this case, are conclusive. "It is not necessary to produce record evidence of a road, and if such evidence is introduced, as for instance, the order establishing the road, it is not necessary, prior to the introduction of such order, to show that all of the previous steps required by the statute had been taken." *Nealy v. Brown*, 1 Gilm. (Ill.) 10; *Dumoss et al. v. Francis*, 15 Ill. 543; *Henline et al. v. The People*, 81 Ill. 269; *Galbraith v. Littlech*, 73 Ill. 211.

In the following cases the question as to rights acquired

by the public in traveling over vacant and unoccupied land is discussed. *Kyle v. Town of Logan*, 87 Ill. 64; *Fox v. Virgin et al.*, 5 Brad. 515; *Alvord v. Ashley*, 17 Ill. 363.

“It seems to be well settled, that no particular time is necessary for evidence of dedication.” “If the act of dedication be unequivocal it may take place immediately.” *Marcy v. Taylor*, 19 Ill. 636; *Wragg et al. v. Penn Township*, 94 Ill. 25.

“Where a person is in the actual, open and notorious possession of land, claiming to own the same, this will afford notice to the world of all his rights and equities in the same. *Strong v. Shea*, 83 Ill. 575. Possession of land is notice to the purchaser thereof of all the interest claimed by the person in possession. *Williams v. Brown*, 14 Ill. 290; *Cowen v. Loomis*, 91 Ill. 132; *D’Wolf v. Pratt*, 42 Ill. 198. Purchaser is estopped from denying validity of plat, having purchased with reference to it. *Field v. Carr*, 59 Ill. 198. The parties must be the same, or there is no estoppel by former judgment. *Miller v. McManis*, 57 Ill. 126; *Merrin v. Lewis*, 90 Ill. 505; *Riverside v. Townshend*, 120 Ill. 12; *Garrick et al. v. Chamberlain et al.*, 97 Ill. 620. To make a matter decided, *res adjudicata*, there must be a concurrence of four conditions: First, identity of the thing sued for; second, identity of the causes of action; third, identity of persons; fourth, identity of parties. *Bouvier’s Law Dic.* 467.

A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made, first, by a court of competent jurisdiction upon the same subject-matter; second, between the same parties; third, for the same purposes. *Aspden v. Nixon*, 4 How. 467.

If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence. *Russell v. Place*, 94 U. S. 606.

Abandonment of a highway is not a question of the time of its non-user, but is simply a question of fact to be established like any other question of fact in the case.” *Brockhausen v. Boehland*, 36 Brad. 229.

APPELLEE'S BRIEF, JAMES R. WARD, ATTORNEY.

At common law, the open, adverse and uninterrupted use of a road by the public as a highway, under a claim of right, for a period of twenty years continuously, was sufficient to clothe such road with the legal character of a public highway. *Daniels v. People*, 21 Ill. 442; *Lewiston v. Proctor*, 27 Ill. 417; *Gentleman v. Soule*, 32 Ill. 271.

In 1887, the Legislature of this State enacted an amendment to Sec. 1 of the act in regard to roads and bridges, in counties under township organization. The amendment provides, "That all roads in this State which have been laid out in pursuance of any law of this State, or of the Territory of Illinois, or which have been established by dedication, or used by the public as a highway for fifteen years, and which have not been vacated in pursuance of law, are hereby declared to be public highways." Laws 1887, 263.

Was the road on which the fences were cut a public highway? This was the sole issue in the case. We contend that a judgment against a city, county or town, in matters of general interest, binds the inhabitants thereof; that a judgment upon an issue is binding upon all parties and privies thereto; that if in a suit by a town to recover a penalty for obstructing a highway, it is determined that the *locus in quo* is not a highway, no inhabitant of that town can remove the obstruction, and justify the act on the ground that the *locus in quo* is a public highway, and re-litigate the question. *Harmon v. Auditor, etc.*, 123 Ill. 130; *Crosby v. Gipps*, 16 Ill. 352; *School Directors v. School Directors et al.*, 135 Ill. 472; *Rhoads v. City of Metropolis*, 36 Ill. App. 123; *Bennitt v. Star M. Co.*, 119 Ill. 14; *Jenkins v. Int. Bk.*, 111 Ill. 467; *Cole v. Favorite*, 69 Ill. 460.

OPINION OF THE COURT, WALL, J.

This was an action of trespass by appellee against appellant.

The tortious act complained of was the cutting of certain wire fences belonging to appellee, and the defense was that the fences were built across a public highway. The ques-

tion, therefore, was whether the places where the fences were cut were in the highway. The appellee recovered a verdict and judgment thereon for \$10.

Since the case was submitted to us it has been suggested that the bill of exceptions is faulty in not professing to contain all the evidence, in not bearing the seal of the judge who signed the same, and in not appearing to have been filed in the office of the clerk, but by an additional record furnished at the instance of appellant, it appears that these objections were based on an imperfect transcript of the record and do not really exist.

The record is brought here by appellant. Errors and cross-errors have been assigned thereon.

It appears that at the March term, 1837, a petition was presented to the county commissioners of Greene County, to open a public road from Rattan's Mills to Carrollton, the county seat. Viewers were appointed, and on their report at the September term following, an order was made to open the road.

The following year it was opened. It passed over the land now owned by appellee, containing forty acres, entering at a point on the south line east of the center and leaving at a point on the north line a few rods from the northwest corner.

It was "blazed" or marked and was used by the public thereafter as so marked, except as will be stated, until closed by the appellee. The forty acre tract was vacant and unoccupied when the road was laid out, and so far as the evidence shows, remained so for more than twenty years, when one Musgrove took possession as owner. He died in 1866, leaving his widow and children in possession. Afterward the widow married one Harrigan, who remained in possession a considerable time. The Musgrove heirs, having become of age, sold the land to appellee in 1883-4, and he has since been in possession.

It seems that Musgrove fenced in a part of the road, turning the travel around his fence, but just where this was or how much it amounted to, is not clear.

There is evidence also that one Hedspeth fenced across the road at the south end of the forty, but how much he took in or on whose account he so acted, is not shown. Still later, in 1878, Harrigan fenced in a part of the road on the south end, cutting a road out around his fence for the public. Before that, however, a change had been made at the north end.

The forty acre tract lying north of this came into possession of one Davis, and in fencing his land he took in about an acre lying west of the road, and thus turned the road to the west so that it passed out of this forty at the northwest corner thereof. Afterward at the instance of one Clark Stevens, the grandfather of the Musgrove children, the road supervisor required Davis to move his south fence back twenty feet, so as to give half of the road at this point. Later, this fence having been washed away by high water, Davis rebuilt on the line, again turning all the travel on this forty. This was the situation when appellee bought the land. It is somewhat uncertain how far the line of the road through this forty was changed by these encroachments.

According to some of the testimony, the whole of it was affected, and when the appellee bought the land no part of the road was on the old blazed line through this forty; but the weight of the evidence is rather to the effect that only the north and south ends were changed and that over a considerable part of the interior the original track was followed, always. But be this as it may, the authorities recognized the road as changed from time to time across this forty as a public road, and worked it as such, making repairs when deemed necessary and proper.

The appellee built a fence across the south and west lines of this forty, crossing the road where it passed around the fence built by Harrigan on the south and where it passed around the Davis fence on the north. This was done first in 1888, and the fence was taken down by appellee for reasons not necessary now to state. He rebuilt it in 1891, when it was taken down by appellant; therefore this suit.

It thus appears that a public road from Rattan's Mills to Carrollton had been laid out and was used by the public for fifty years or more, and that during all that time it passed over this forty on the line as laid out originally, except so far as diverted by various unlawful acts of encroachment. As we understand the argument of appellee it is that by these acts the public were deprived of the right to the road.

When a man fences in a part of the highway he is liable for a penalty and the obstruction may be removed by the public officials or by a private citizen.

If, when he so encroaches, he gives to the public a way outside of the fence, the way so given, connecting again with the road, may be accepted by the public, and in such case there will be, as to such portion, a public highway by dedication. A road so acquired will be just as binding on the land owner as though it had been laid out in the first instance by the public authorities.

The law will not allow him to commit an unlawful act and profit by it in the manner suggested by the argument.

Having unlawfully interfered with the road at one place he can not be allowed to say that because the public consented to the change thus made, he had a license to take away the road he had thus dedicated and to deprive the public of the use of the whole of the road across his land. Such a proposition needs only to be stated to be condemned. For his own profit or convenience the owner takes in a part of the road, cutting out a way around, in lieu of what he has without right appropriated.

The public, not objecting, and perhaps not seriously affected by the change, accepts the new way instead of the old.

By what right can the owner withdraw what he has so given and how can he then insist that by his own wrongful act he has deprived the public of a right it formerly enjoyed?

Successive encroachments acquiesced in by the public might result in changing the entire line across his land, and he would be bound to recognize it all as a lawful highway.

Much stress is laid, however, upon the fact that when Harrigan made his change he was not the owner of the land, and that the real owners were under disability so that they could not bind themselves by their own act, nor could they be bound by the act of another.

Concede this, yet when they came of age they continued the encroachment by suffering the fence to remain and sold the land in this condition to appellee, no doubt realizing more for the property because of the condition. By thus appropriating the benefit flowing from Harrigan's act they became bound by it and are estopped to deny its legal import. So the appellee, buying the land in this condition, took it subject to the rights of the public, and for five years or more he acquiesced in the situation.

It is urged, however, that the exit of the road at the northwest corner was not where it was originally, and that this was produced wholly by the act of Davis.

When Harrigan made the change at the south end and provided a way around his fence he did it with reference to the whole of the road, as it then was, on the land of which he had possession. It would not be worth while to go around his obstruction if one could not go beyond and travel the whole road.

It was a necessary implication that the change as made at the north end was acquiesced in by him, and as the road so changed was accepted by the public and worked where necessary, the public acquired the right of exit there, so far as Harrigan was concerned. When the Musgrove heirs came to their estate they found it in the condition as left by Harrigan, and as already shown, accepted it by taking the benefit of it. This included all that was implied and estopped them to complain of the change at the northwest corner.

As to the cross-errors but little need be said. After appellant had cut the wires and the act for which this suit is brought was complete, the highway authorities brought suit against appellee for obstructing the road. That suit resulted favorably to the appellee, and he sought to introduce the record thereof in evidence, for the purpose of show-

ing an adjudication that there was no public road at the point where appellant cut the wires. The evidence was excluded and it is upon this action of the court that appellee assigns cross-errors.

It is urged in support thereof that, when the public authorities litigate, with a citizen, a question affecting the public, the adjudication binds all who claim in the right of the public, and it is said by counsel, that it would be unjust, after it had once been determined that the *locus in quo* is not a highway, to permit any one to treat it as a highway and harass the land owner by trespass, and compel him to re-litigate the question in other cases.

Whatever may be the proper rule as to the case of one opening a fence after the *locus in quo* had been adjudged not a highway, in a suit directly involving the question between the public authorities and the land owner, we are constrained to say it is not applicable to the case of one whose act was committed before the adjudication.

He had no control over the suit afterward commenced. His act was complete. He could not undo it, and to bind him by the result of a subsequent suit in which he could take no part, and which might, by mischance or collusion, have been wrongly decided, would be the height of injustice. We think the court ruled properly in excluding the record, and the cross-errors should be overruled.

As we regard the case presented by the record the appellee was not entitled to a recovery, and the court should have granted a new trial. In this view of the matter, it is not necessary to discuss the instructions. Should the case on another trial present substantially the same aspect as now, it will be proper to instruct the jury to find for the defendant.

The judgment will be reversed and the cause remanded.

Dwelling House Ins. Co. of Boston, Mass., v. Dowdall.49 33
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1. *Insurance—False Statements in the Application.*—A condition in a policy was that the entire policy should be void “if the interest of the assured was other than unconditional and sole ownership in fee, free from all liens whatever, or if the subject of insurance be a building on ground not owned by the assured in fee simple.” In the application the assured stated that she had title by warranty deed. It appeared that she was the widow of a deceased person, who, by his will, devised the land on which the building insured was situated, to her “to have and to hold until August 1, 1894, provided, if she should marry before that date, then she should take her dower,” etc. *It was held*, that the assured did not have the interest required by the policy, and that the insurance was void.

Memorandum.—Action on a policy of insurance. Appeal from a judgment rendered by the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

APPELLANT'S BRIEF, HARBERT & DALEY, AND WITHERS &
RAINEY, ATTORNEYS.

It does not appear from the evidence that the agent soliciting the insurance, or the company, had any knowledge of the condition of the title, other than the statement contained in her application, to wit, that she derived title to the land by “warrantee deed.” As we understand the law, this state of facts renders the policy void. *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; *Union Ins. Co. v. Chipp*, 93 Ill. 99; *Rockford Ins. Co. v. Seyferth*, 29 Brad. 513.

The legal effect of the policy, and of the question and answer is, that they amount to a warranty that the appellee was the sole and absolute owner of the property. *Etna Ins. Co. v. Resh*, 40 Mich. 241; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402. If any fact material to the risk be misrepresented either through fraud, mistake or negligence, the policy is avoided. *Hazard v. New England Marine Ins. Co.*, 8 Pet. (U. S.) 557.

An offer of insurance, such as to convey an impression to

the insurer that the title was complete and absolute, while it was in fact precarious, depending for its continuance on contingent events, is misleading, and vitiates the insurance. A misrepresentation which is material to the risk avoids the policy. *Columbia Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25.

APPELLEE'S BRIEF, MARK MEYERSTEIN, ATTORNEY.

If the party insured has any interest that would be injured in the event the peril insured against should happen, the courts will maintain his policy. *Agricultural Ins. Co. v. Clancy*, 9 Brad. 140; *Shaw v. Aetna Ins. Co.*, 49 Mo. 578; *Flanders on Fire Insurance* (2d Ed.) pp. 387-378, Secs. 1, 2 and 3.

An insurable interest is such a title as, if there should be loss, it would have to fall upon and have to be borne by the assured. *Rockford Ins. Co. v. Nelson*, 65 Ill. 420.

The assured is entitled to recover, where he has an insurable interest at the time the policy is obtained and also at the time of the loss, whether that interest is a title in fee for life or only merely equitable, the whole amount of damage done to the property not exceeding the amount for which it is insured. *Andes Ins. Co. v. Fish*, 71 Ill. 625.

OPINION OF THE COURT, WALL, J.

This was an action upon a policy of insurance against loss by fire.

The plaintiff recovered and the defendant has brought the record to this court by appeal.

The property covered by the policy was a barn and its contents. It was a condition of the policy that the entire policy should be void "if the interest of the assured be other than unconditional and sole ownership, free from all *liens* whatever, or if the subject of insurance be a building on ground not owned by the assured in fee simple."

The plaintiff had not the interest here required. She was the widow of Hayden E. Dowdall, deceased, who, by his will, devised the land on which the barn was situated to the plaintiff, "to have and to hold until August 1, 1894,"

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provided, if she should marry before that date, then she should take her dower, etc. It is sought to support the claim on the ground that she had an insurable interest, but this is no answer to the objection that she had not such an interest as the policy required.

In her application it is stated that she had title by warranty deed. This application was drawn up by the soliciting agent of the company, and by her testimony it appears that she did not make such a statement of her title, though it is not perfectly clear what she did say to him in that regard. She seems not to remember very distinctly.

If the only point were whether there was a misrepresentation in the statement that she had title by warranty deed, the verdict of the jury would perhaps be conclusive. But a warranty deed might or might not have given her such a title as the policy required. If it appeared that the agent of the company knew what her title was, though she stated it imperfectly or not at all, another aspect would be presented. It does not so appear, and there is nothing from which we can infer that he understood the title. At the most there is a failure to show that the true nature of the title was disclosed, and knowing what it was, the company, by its agent, made the contract of insurance. The condition on this subject contained in the policy is a valid one and is justified by sound reasons. It is not desirable that persons in possession of property for a term of years should be permitted to insure it as though they were the absolute owners. The hazard in such case would, of course, be very great, owing to the temptation to burn the property for the sake of the insurance. After a careful examination of the case as presented by the record and by the briefs of counsel, we are unable to see any plausible excuse for disregarding this condition of the policy. We are of opinion the court erred in its instructions to the jury on this point, and in refusing the motion for a new trial. The judgment will be reversed and the cause remanded.

Fletcher v. Massey.

1. *Attorney Fees under Statutes.*—In a suit for wages the court gave the following instruction: If the jury find for the plaintiff, the form of the verdict will be, "We, the jury, find for the plaintiff and fix her damages at \$ for wages, and \$ for attorney's fees," which was all the instruction given in the case (except one as to the form of a verdict) for the defendant, under the statute providing that whenever a servant or employe shall have cause to bring a suit for wages earned, and due and owing according to the terms of the employment, and shall establish by the decision of the court or jury that the amount for which the suit is brought is justly due and owing, and a demand therefor has been made in writing, etc., then it shall be the duty of the court to allow a reasonable attorney fee. It is for the court and not the jury to fix the amount to be allowed as the attorney fee, and the instruction was held erroneous.

2. *Attorney Fees—Demand for Amount Due.*—Under the provision of the "act providing for attorney's fees when a mechanic, laborer or servant sues for wages," (Laws, 1839, 362, Hur d's Statutes, 1891, 185,) if the amount recovered is less than the amount named in the demand in writing, required by the act, no attorney fees can be allowed.

3. *Set-off.*—Where the evidence of a set-off is not disputed it is the duty of the jury to allow the same.

Memorandum.—Action for damages. Appeal from a judgment for plaintiff, rendered by the County Court of Moultrie County; the Hon. JOHN D. PURVIS, County Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

The opinion of the court states the case.

SPITLER & HUDSON, attorneys for appellant.

W. G. COCHRAN, attorney for appellee.

OPINION OF THE COURT, PLEASANTS, J.

Appellant, a widowed farmer, seventy-two years of age, employed appellee, a married woman living near, as his housekeeper, without any express agreement as to wages. The evidence tends to show her services were reasonably worth \$2 per week. She served nine weeks and acknowledged the receipt of \$9, on account. This suit was brought

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before a justice of the peace, for the balance claimed, and in a trial by jury in the County Court, on appeal, she obtained judgment on a verdict for \$7 as wages and \$15 as attorney fees, which the court refused to set aside.

The defense offered was that she neglected her work to such an extent as to make her services worth not more than \$1.50 per week, and set-off for board of her children.

She and two of them testified that when he came for her, she said she might as well not go if he charged her for the board of her little boy, and he replied, "What the boy eats will not break me up;" which he denied. She took her son, twelve years of age, with her, and he remained with her eight weeks. A younger son, eight years of age, came the second week and remained until she left. A married daughter, who seems to have been at the time of the engagement with the mother, but whether a widow, or living with her, does not appear, also stayed at defendant's house the last week of her service. There was nothing tending to show that the younger son and daughter or either of them came by invitation or at the request of defendant, and their board was shown, without contradiction, to be reasonably worth \$2.50 per week each.

Appellee testified: "I worked for defendant as his house-keeper. I went there in May, 1891, and left in July. I think my services were reasonably worth two dollars per week. He has paid me nine dollars. He still owes me nine. I wrote him a letter and told him he owed me nine dollars." All of which she repeated on cross-examination. She further stated she could not write, but the letter was written as she dictated, by her daughter. It was identified by the latter, and contains the following: "I was at your house nine weeks. You owe me four dollars and a half, and if you don't pay it I will sue you for two dollars a week, and if you don't pay me with no trouble I will fix you for the next cook. I will give you till the first of next week to pay it and if you don't I will sue you." It bore no date, nor was there any evidence tending to fix the time when it was delivered or sent to appellant. The demand indorsed on

the summons, was \$18. An attorney who heard the trial in the County Court, testified that \$15 would be a reasonable fee for trying it.

No instruction was given to the jury except as to the form of their verdict. The material part was: "If the jury find for the plaintiff, the form of the verdict will be 'We the jury find for the plaintiff, and fix her damages at \$..... for wages, and \$..... for attorney's fees,' " thus apparently directing allowance for attorneys fees, in case they should find any amount whatever due and owing for wages.

The statute provides that "whenever a * * * servant or employe shall have cause to bring suit for his or her wages earned, and due and owing according to the terms of the employment, and he or she shall establish, by the decision of the court or jury, that the amount for which he or she has brought suit is justly due and owing, and that a demand has been made, in writing, at least three days before suit is brought, for a sum not exceeding the amount so found due and owing, then it shall be the duty of the court before which the case shall be tried to allow to the plaintiff, when the foregoing facts appear, a reasonable attorney fee in addition to the amount found due and owing for wages; and in justice court such attorney's fee shall not amount to less than \$6.00, and in the County or Circuit Court not less than \$10.00, to be taxed as costs of suit." Starr & Curt. Stat. Vol. 3, p. 101-2.

We think it is for the court and not the jury, under this statute, to fix the amount to be allowed as an attorney fee, but perhaps it may be presumed that in this case the court approved and adopted the amount found, and on the principle that *utile per inutile non vitiatur*, the verdict as to wages may not be invalidated by the finding. *Armstrong v. The People*, 37 Ill. 459. Treating it as a verdict for the amount of wages found to be due, and the fee as having been allowed by the court, neither was warranted by the evidence.

It appeared that during the period of her services, she was repeatedly absent—at Dalton City—and three or four times at Decatur. On one occasion she was away two whole days.

Fletcher v. Massey.

One afternoon she spent at work in her own garden. A son of the defendant fixed the time she came as May 20th, and the time she left as July 18th, a period of eight weeks and three days. But if it was nine weeks, as she and other witnesses roundly state it, the jury were warranted, in view of these advances, in allowing for only eight. This they seem to have done. But they wholly ignored the defendant's set-off; for which we see no sufficient or plausible reason. Although a married woman, she had a right to contract for her services, and to receive as her own the wages she earned. This involved the right to agree with her employer as to how she should be paid, and to assume any obligation or liability that would otherwise constitute a legal set-off. She evidently did not understand that her engagement as housekeeper would, of itself, entitle her to free board for her "little boy;" and if she obtained its allowance by special agreement, that did not authorize her to bring another also, and keep him at defendant's expense for eight weeks. There is nothing in the evidence to raise a presumption that defendant consented to this; nor is there any pretense that either of the boys rendered him any service. The engagement to serve was not for any definite time, and it does not appear that when he made the payments on account he had any expectation or reason to expect that she would leave when she did, or that her younger son would remain so long as he did. The jury, therefore, could not properly infer from those payments that he intended to make no charge for this board. Upon the undisputed evidence we think he was clearly entitled to have for it all it was reasonably worth—especially after she raised her claim from \$1.50 (according to her letter), to \$2.00 per week, for wages.

Any amount allowable in reason for that would have extinguished her balance, or at least reduced it below the sum that she demanded in writing; and in either case she would not be entitled to any allowance for attorney's fees, even if the demand in writing had been made at least three days before the suit was brought, which she was required, but failed, to show.

Believing, therefore, that the instruction was wrong, and that the finding was against the clear weight of the evidence, and did injustice to appellant, the judgment will be reversed and cause remanded.

Ohio & Mississippi Ry. Co. v. Brown.

1. *Variance, Pleading and Evidence.*—It is a general rule that an objection on the ground of a variance between the pleadings and the proofs must be specific and must set out the ground relied upon, so that the plaintiff may avoid the objection by an amendment.

2. *Pleadings—Implied Obligations.*—Where the action was for failure to keep an implied obligation that the shipper of live stock should have time to sign a certain written contract, required by the rules of the carrier, before the starting of the train, whereby the shipper was prevented from taking the train, and thereby the stock were damaged for the want of his care and attention, it was not necessary to set out the written contract according to its legal effect in the declaration, nor to show a compliance with its conditions, as to the time and manner of preferring a claim for damages.

Memorandum.—Action for damages. Appeal from a judgment for plaintiff rendered by the Circuit Court of Cass County; the Hon. LYMAN LACEY, Circuit Judge, presiding. Heard in this court at the November term A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANT'S BRIEF, POLLARD & WERNER, ATTORNEYS, HENRY PHILLIPS, OF COUNSEL.

“The plaintiff being bound to state his contract correctly, it follows that a misstatement of the quality or nature of defendant's promise, and his consequent liability, will be a fatal error, and will, if the defendant's plea put the fact in issue, subject the plaintiff to a non-suit. If the defendant's promise or engagement, whether it be verbal, in writing, or under seal, embody or contain, as a part of it, an exception or proviso which qualifies his liability, or in certain instances renders him altogether irresponsible, so that he was not in law absolutely bound, the declaration must notice the exception or proviso, or there will be a fatal misstatement. Thus, where the declaration stated that the defendant had under-

taken to carry and deliver goods safely, and the contract proved was to carry and deliver them safely, fire and robbery excepted, it was held that there was a fatal variance." 1 Chitty on Pleading (13th Am. Ed. 1859), pp. 308, 309.

This question has recently been considered by our Supreme Court, in the case of Wabash Western Ry. Co. v. Friedman (March 24, 1892), 30 Northeastern Rep. 353, and the law, as laid down by Chitty, followed.

APPELLEE'S BRIEF, R. W. MILLS, ATTORNEY.

This suit not being upon a contract but for an alleged willful omission of a plain duty, the limitation and terms of the contract are not applicable or binding on the plaintiff. But if it were a suit upon the contract, or if the contract in any way affected the plaintiff's rights in the suit, neither the limitation of six months nor the requirement of a written claim for damages in ten days would affect his right to recover. Courts will not permit a contract to be interposed as a shield against gross negligence or willful neglect of duty by a common carrier. I. C. R. R. Co. v. Read, 37 Ill. 484; Arnold v. I. C. R. R. Co., 83 Id. 273; J. S. E. R. R. Co. v. Southworth, 135 Id. 250.

OPINION OF THE COURT, WALL, J.

This case was before us at a former term (November, 1891) and need not be re-stated. The point relied upon by the plaintiff then, was that the train did not stop at the platform so as to allow him to get aboard.

An additional count has since been filed, in which it is alleged that the defendant did not allow the plaintiff sufficient time after the stock were loaded to procure his shipping contract and board the train, whereby he was prevented from going on the same train with the stock and taking care of the same, and for the want of such attention the stock was injured, etc.

It is urged the court erred in allowing the plaintiff to introduce the written contract in evidence before the jury, because it is not the contract set out in the declaration.

The declaration does not undertake to describe the contract, and refers to it only as matter of inducement. The defendant made no objection on the ground of variance, but objected generally to the admission of the evidence. It is a general rule that an objection for variance must set out the specific ground relied on, so that the plaintiff may avoid the objection by an amendment. In the case of *Wabash R. R. Co. v. Friedman*, 30 N. E. Rep. 353, cited by the appellant in support of this point, the objection was specifically made, and the Supreme Court say the plaintiff might have amended but chose not to do so.

We are, however, inclined to think it was not necessary to describe the contract in the declaration.

The plaintiff's complaint is, that the defendant undertook to carry the stock and the owner for a certain consideration—that by the rules of the carrier it was necessary for the shipper to execute a written contract before he could take passage on the train—and that it was the duty of the carrier to give sufficient time to comply with these rules. The action is not for negligence in transporting the stock, but for not performing an implied obligation to give sufficient time after loading the stock, to enable the shipper to board the train. In this view of the matter it was not necessary for the plaintiff to set out the contract according to its legal effect in the declaration, nor to show a compliance with its conditions as to the time and manner of preferring his claim for damages. Indeed we do not see that it was necessary to offer it in evidence at all. Having sold the plaintiff the right to travel upon a particular train, it was the duty of the defendant to give him a reasonable opportunity to take passage thereon, and if it failed to do so, it became liable for all proximate damages occasioned thereby.

Therefore, the only question for the jury was, whether sufficient time was afforded after the stock were loaded and before the train started. There was conflict as to this, the evidence offered by plaintiff tending to support his contention, and that for defendant tending the other way.

T., St. L. & K. C. R. R. Co. v. Kingman.

Nobody knows precisely how many minutes elapsed, and the estimates vary considerably, as might be expected.

It is urged as error, that one witness was allowed to state that after plaintiff had got his contract, there was not time to walk down to the place where the train was before it started, because this called for the opinion of the witness. It was a matter of opinion as to the distance, the time required to walk it, and the time actually allowed. He would have been permitted to give his estimate as to all these in detail, and we think there was no error in allowing him to give it as to all in one statement, especially as we find he was thoroughly examined and cross-examined as to all the circumstances, including the location, distances, what transpired and the like.

It is urged the court erred in giving the first instruction, because it ignored the various terms and conditions of the contract as to gross negligence, etc. As we have already observed, the plaintiff was not suing for a violation of the terms of the contract.

We find no error in the record of such importance as to require us to reverse the judgment. It will therefore be affirmed.

Toledo, St. L. & K. C. R. R. Co. v. Kingman.

49	43
58	161

1. *Railroads—Damages by Fires, etc.*—When an injury results from fires originating on the right of way of a railroad, and shown to be caused by sparks thrown out by an engine, a *prima facie* case is made for the plaintiff, subject, however, to be rebutted by evidence that the company used a very high degree of care and skill to avoid inflicting the injury in the construction and operation of its engine.

2. *Instructions—Owner of Premises Injured by Fire.*—In action against a railroad company for burning a meadow, the court instructed the jury that, “it shall not, in any case, be considered negligent on the part of the owner or occupant of the property, that he has used the same in the same manner, or permitted the same to be used or remain in the same condition it would have been used or remained, had no railroad passed through or near the property so injured. *Held*, proper under the evidence, no question of due care on the plaintiff’s part being raised.

3. *Railroads—Damage by Fire—Use of Lands, etc.*—It is not error to refuse to allow a witness to testify to facts tending to show that a meadow destroyed by fire, would produce more profitable crops of corn than of hay. The fact that the land, after the destruction of the meadow by fires, had it been cultivated in corn, would have yielded a crop more valuable than in hay, is a matter entirely irrelevant to the right or amount of recovery.

Memorandum.—Action for damages. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Shelby County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANT'S BRIEF, H. A. NEAL, ATTORNEY.

The statute means that if fire is set by engines, that creates the presumption of negligence, and unless such presumption is rebutted by defendant, plaintiff's case is made. But such presumption may be rebutted, and is in fact rebutted when the defendant shows such engines were equipped with latest improved spark arresters, that the same were in good repair, and that such engines were properly and carefully managed by competent and skillful engineers; and when thus rebutted, a verdict for plaintiff can not be sustained unless there is some evidence showing negligence other than the mere fact of the setting of the fire. *C. & A. R. R. Co. v. Smith*, 11 Brad. 348; *C. & A. R. R. Co. v. Quaintance*, 58 Ill. 389; *T. W. & W. R. R. Co. v. Larmon*, 67 Ill. 68; *St. L., V. & T. H. R. R. Co. v. Funk*, 85 Ill. 460; *I., B. & W. R. R. Co. v. Craig*, 14 Brad. 407; *C. & N. W. R. R. Co. v. Boller*, 7 Brad. 626; *I. C. R. R. Co. v. Mills*, 42 Ill. 407.

APPELLEE'S BRIEF, CHAS. BENNETT, ATTORNEY.

This case is so nearly like *Wabash Railroad Co. v. Smith*, 42 Ill. App. 527, which has recently been before this court, that we deem it unnecessary to cite any other authority.

OPINION OF THE COURT, BOGGS, J.

Fire communicated to appellee's premises from the engines of the appellant company, burned a stack of hay, some

1,600 rails in a fence, and about eighteen acres of meadow. This action was instituted before a justice of the peace to recover the damages thus occasioned. The appellant company brought the case into the Circuit Court by appeal and this is an appeal from the judgment in favor of the appellee in the Circuit Court. The fires in question originated off the appellant's right of way, and it is conceded that the evidence sufficiently shows that they were caused by sparks of fire thrown out by engines of the appellant. This made a full *prima facie* case for the appellee and charged the appellant with negligence (Sec. 104, Chap. 114, S. & C. Statutes), subject, however, to be rebutted by evidence that the appellant used a very high degree of care and skill to avoid inflicting the injury. It has been held that under the circumstances presented in cases hereafter cited, that this statutory presumption of negligence was rebutted by showing that the engine was equipped with the most effective appliances for arresting sparks in use or known to the profession of locomotive engineers; that the same was in good order and repair and that the servants in charge of the engine were competent and experienced, and that they properly and carefully handled and controlled the engine. C. & A. R. R. Co. v. Quaintance, 58 Ill. 389; T. W. & W. R. R. Co. v. Larmons, 67 Ill. 68; St. L., V. & T. H. R. R. Co. v. Funk, 85 Ill. 460; I. C. R. R. Co. v. Mills, 42 Ill. 407. All this, appellant insists, was proven in the case at bar. The uncontradicted testimony was that the engines were supplied with the necessary spark arresters, but it can not be said that the proof as to the condition of such appliances on the respective dates of the fires was of the most satisfactory character. The first of the fires was occasioned on July 23d by sparks or cinders from engine No. 34, and the last fire was on August 4th, and was caused by engine No. 46. The testimony of John Folk, appellant's master mechanic, and of John Kelly, its boiler maker, is relied upon to show that the "spark arresters" were in good condition and repair at the time of the respective fires. The master mechanic could not fix a date when he had examined these appliances upon

either engine. He made examinations only when his attention was called to them and the occasion required an examination and did not assume to know the condition immediately before the engines went out upon the road or after they returned from the trips in question; Mr. Kelly only testified to examinations made of the engines some days after the fires. The jury were warranted from the evidence in believing that cinders as large as a "small hazel nut" were cast by the engine across the appellant's right of way and upon the appellee's premises.

It has frequently been held, that from such proof an inference arises, that there was something unsuitable or improper in the construction of the engine, or in the appliances intended to arrest the escape of fire or sparks, or that the same was not in good order and repair. 8 Amer. & Eng. Ency. of Law, page 8, note 1.

The master mechanic stated that cinders of that size could not escape from an engine if the appliances were in order, and the testimony of Mr. Leonard, one of the appellant's engineers, was to the same effect; Mr. Leonard also testified that it was the "firing and working of an engine" that caused it to throw sparks.

There was no proof as to the competency or experience of the "fireman" on either engine. When the evidence is all considered, certainly we can not say that it is manifest that the jury should have concluded that the appliances for arresting sparks were in good order, or that the engines were manned by competent, experienced firemen. It further appeared from the evidence that the engines were drawing long trains of freight cars, at a high rate of speed, up an ascending grade, which demanded rapid exhaustion of steam, and the consequent blowing out of sparks and fire to a much greater extent than usual, that everything was dry, and the danger of communicating fire from an engine great. All of this was proper for the consideration of the jury in considering whether the appellant exercised the very high degree of care and caution necessary to rebut the statutory imputation of negligence.

The first instruction given for the appellee omits reference to any duty of the appellee to use ordinary care, etc. For this reason a reversal is asked. Sec. 104, Chap. 114, R. S. (S. & C. Statutes, p. 1949), upon which this recovery is based, provides: "It shall not in any case be considered negligent on the part of the owner or occupant of the property injured, that he has used the same in the same manner, or permitted the same to be used, or remain in the same condition it would have been used or remained, had no railroad passed through or near the property so injured." The uncontradicted evidence shows that the appellee was using her property as this statute gave her the right to do. There was no question of "due care" upon her part raised by any evidence in the case, and consequently no injury could have occurred by reason of the omission complained of.

It is complained that the court refused to allow the witness, Bolt, on cross-examination, to testify to facts which the appellants contend would tend to show that the meadow land would produce more profitable crops of corn than of hay. It is argued that if the land, after the destruction of the meadow by fires, could have been cultivated in corn, and would have yielded probably a crop more valuable than the hay crop, that in such case the appellee ought not to be allowed damages for the destruction of the meadow. The appellee chose to devote the land to the production of hay. She had the right to do so and had secured a productive meadow upon it. She was damaged by its destruction and was entitled to recover such damages. Whether she could more profitably employ the land in the production of corn or some other crop was entirely irrelevant to the right or the amount of such recovery.

Complaint is made that Bolt was permitted to testify as to the condition of the right of way. The case came into the Circuit Court by appeal from a justice of the peace. There was no declaration and the appellee had the right to introduce testimony tending to show a right of recovery under the provisions of Sec. 63, Chap. 114, R. S., requiring that

the right of way of appellant be kept clean of combustibles. As the evidence, when finally heard, did not warrant a recovery under Sec. 63, the court, at the request of the appellant, instructed the jury that it was wholly immaterial whether the right of way was free from combustibles or not. We do not think the appellant has just cause of complaint of such action of the court, or that there is error in the record in any other respect. The judgment must be and is affirmed.

49 48
146 596

Parr et al. v. Miller et al.

1. *Schools—Power of Trustees to Organize New Districts.*—School trustees, under the act of the General Assembly approved May 21, 1889, are authorized to organize new school districts out of territory belonging to two other districts, upon a petition signed by the legal voters (two-thirds in number) living within the boundaries of the proposed new district.

Memorandum.—Certiorari to the county superintendent of schools. Appeal from a judgment rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

The opinion of the court states the case.

APPELLANTS' BRIEF, FRANK J. PARR, JOHN E. POLLOCK, AND
JOSEPH M. WEAKLY, ATTORNEYS.

This is an attempt to organize, under section 48 of the Session Laws of 1889, page 278, which is divided into three paragraphs, a new school district out of two other districts. The petition is in conformity with paragraph three of the section, but not in conformity with the first and second paragraphs of said section. We claim that the petition for the new district must comply with the three paragraphs of the section, and be within the scope of all three in order to confer jurisdiction; and that the petition for the new district was wholly insufficient.

Section 33 of the School Law of the Session Laws of 1887, page 291, for which section 48 of the law of 1889 is a substitute and an amendment, connects each of the three paragraphs set out by the word "or." The laws of 1889, leave out this connecting word. It is believed that the legislature had the intention, therefore, to require a compliance with all three of the paragraphs of section 48.

Under the statute of 1887, a compliance with any one of the paragraphs in said section 33, was all that was necessary to the formation of a new district. The legislature acted wisely in amending the statute so that all three of the paragraphs should be complied with; *e. g.*, under the old statute all of the petitioners might live in one of the old districts, and the other district, which was sought to contribute to the new district, might be despoiled of its territory without a single person in the district desiring it. It will be noticed that the case of Carrico v. The People, 123 Ill. 200, was decided under the law of 1881, which is the same as the law of 1887.

APPELLEES' BRIEF, WELTY, STERLING & McNULTA,
ATTORNEYS.

Appellants raise but two questions.

First: The petition should conform to all of the three paragraphs of section 48, Laws 1889, 278.

Second: There should be some evidence in the record outside of the petition, proving that the allegations in the petition are true.

As to the first point we believe the law of 1889 is identical in sense and substance with the law of 1881 on this point, and as to the requirements of a petition under that law we cite Carrico v. The People, 123 Ill. 198.

The second point has been definitely settled by the courts. The petition needs no verification. The record need show no verification. If the allegations of the petition make a case under the law, it is sufficient to give the trustees jurisdiction, and they must exercise their own discretion as to the manner of considering it and as to their own decision,

being only bound to act in good faith. Trustees v. The People ex rel., 121 Ill. 552; Trustees v. The People ex rel., 25 Ill. App. 25; Brown v. Roberts et al., 23 Ill. App. 461.

The law presumes that they did what it requires of them. Section 53, page 280, Session Laws 1889; McManus v. McDonough, 107 Ill. 95.

OPINION OF THE COURT, BOGGS, J.

The board of trustees of T. 24 N., R. 4, E. 3d P. M. in McLean County, Illinois, organized a new school district composed of territory taken out of two existing districts. This action of the trustees was sustained by the superintendent of schools of the county on appeal.

The school directors of the districts out of which the territory for the new district was taken by petition to the Circuit Court of McLean County, caused the record of the establishment of such new district to be brought into court by a writ of certiorari. The court sustained the record and quashed the writ. This is an appeal by the petitioning directors from the judgment of the Circuit Court.

Two questions only arise: The first is, are school trustees under the act of the General Assembly, approved May 21, 1889, authorized to organize a new school district out of territory belonging to two other districts upon a petition signed only by legal voters (two-thirds in number) living within the boundaries of the proposed new district. The other question is, must the record of the proceedings of the trustees in the organization of such new district, show affirmatively that the allegations of facts contained in the petition were supported by evidence presented to and heard by the board.

The question last mentioned is disposed of by the construction we are disposed to put upon the final sentence of Sec. 53 of the act mentioned, which is as follows: "After the trustees shall consider a petition no objection shall be thereafter raised as to its form, and their actions shall be *prima facie* evidence that all the formal requirements have been complied with." The substance of the proceeding at bar is the proposed change asked for by the petitioners. Before the trustees could consider this question, certain

requirements of the statute must be complied with. While these requirements are important and touch the jurisdiction and power of the trustees, yet they are, as to the substance of the proceedings, preliminary, and in a sense formal, and it is in that sense that the word formal is used in said Sec. 53. The preliminaries must be determined by the commissioners before the real matter in issue is considered, and the fact that the commissioners advanced to the consideration of and acted upon the material and substantial matters of the proceeding is, by force of the statute, we think to be accepted as *prima facie* evidence, that all requirements preliminary to a legal consideration of such matters has been complied with.

Whether the petition invested the trustees with power to act remains to be determined. The petition asks for the formation of a new school district out of territory belonging to two other districts.

Trustees have power to make changes in districts only in certain respects as enumerated in Sec. 76, Chap. 122, R. S., (3d Vol. S. & C. Stat. 1159) namely, first, to divide or consolidate districts; second, to organize a new district out of territory belonging to two others; third, to detach territory from one district and add same to another district adjacent thereto.

The powers thus given are not to be exercised by the trustees upon their own motion, but only when they are petitioned so to do. Sec. 77 of the same chapter provides for such petitions, and it is as follows:

“Sec. 77. No change shall be made as provided for in the preceding section, unless petitioned for—

First, by a majority of the legal voters of each of the districts affected by the proposed change.

Second, by two-thirds of the legal voters living within certain territory described in the petition, asking that the said territory be detached from one district and added to another.

Third, by two-thirds of all the legal voters living within certain territory, containing not less than ten (10) families, asking that said territory may be made a new district.”

Of the different petitions thus provided, the third, it is clear from the words of the statute, is to be used when the organization of a new district is sought. The petition in the case at bar seeks the creation of a new district, and meets all the requirements of a petition of the third class.

It is, however, urged that it should meet the requirements of each and every class of petitions mentioned in the section. We think not. The purpose of a petition is to empower the trustees to consider the advisability of making the proposed change. If two-thirds of the legal voters, living in certain territory, desire and petition to be detached from one district and added to another, they, we think, have a right to have their desires heard and considered by the trustees. A petition of the second class secures them this right. So, if two-thirds of the legal voters, living in a certain territory, containing not less than ten families, desire and petition that such territory be made a new district, they are entitled to have their desires considered and acted upon by the board of trustees, their petition being of the third class. It must be kept in mind that it is only the right of citizens to have their grievances and desires brought before the trustee for consideration that is involved.

The legal voters of the district or districts affected by the proposed changes, are entitled to be heard before the trustees, or upon appeal, as to the propriety of granting the prayers of such petitioners, but we do not think it was the legislative intent that the requisite number of legal petitioners, who might present a petition of the second or third class, should be denied a hearing, unless a majority of all the legal voters of the district or districts affected by the proposed change, would join in asking that such hearing be granted.

The construction we are constrained to give the statute is consistent with the words employed by the legislature and accords the larger measure of liberty to the citizen.

If the views expressed are correct, it follows that the judgment of the Circuit Court must be, and it is affirmed.

Hayward et al. v. Loper et al., Executors, etc.

49	53
147s	41

1. *Wills—Construction.*—It is a familiar rule of construction that a testator is presumed to dispose of all his estate, and it has been said that the idea of any one deliberately proposing to die testate as to a portion of his estate, and intestate as to another portion, is so unusual in the history of testamentary dispositions, as to justify almost any construction to avoid it.

2. *Wills—Residuary Legatees—Presumption.*—A testator in his original will made provision for his wife and then made the following specific bequests: To his daughter Lodusky, \$3,000; to his daughter Leni, \$1,500; to his son, Cruce V. Loper, one dollar; to his granddaughter Nellie W. Sherman, \$1,500; to his granddaughter Dellie M. Sherman, \$1,500; and then directed that all the residue, together with the wife's portion at her death, be divided into three equal shares or parts, and given as follows: One of said equal shares or parts to Gideon B. Loper, one to Ophelia Loper, and one to Adriana Loper, thus disposing of his entire estate.

By a codicil he recited in detail the provisions of the original will, by which he disposed of the residue of his estate, in equal parts, to Gideon B. Loper and his two daughters, Ophelia and Adriana, and then declared that the share of Gideon B. Loper be reduced the amount of \$5,000, the share of his daughter Ophelia be reduced the amount of \$8,000, and the share of his daughter Adriana be reduced \$3,600. This codicil made no disposition of these reductions. The reasonable presumption is that after the making of the original will the testator disposed of a portion of his estate and gave such portion or its proceeds to the residuary legatees, in the unequal amounts mentioned in the codicil, and that the reductions there stated were to be considered only as between the recipients of his bounty, in equalizing their shares in the residue, and that he had not intended to withdraw the aggregate from them, and leave it undisposed of.

3. *Advancements.*—A person after making his will, by which he bequeathed to a daughter the sum of three thousand dollars, made an arrangement by which he advanced to her the amount, and took from her the following note:

“\$3,000.

CHESTERFIELD, ILL., Feb. 1, 1875.

—————after date I promise to pay to the order of A. W. Loper, note to run during my natural life, three thousand dollars, value received, with eight per cent per annum from date.

LODUSKY HAYWARD.”

At the death of the testator it was insisted on behalf of the maker that the note was not payable until her death, and that she was entitled to her legacy in money. *It was held*, that the word *my* should be read *his*, and that the note was payable at the death of the payee, who was the testator.

Memorandum.—Bill to construe a will. Appeal from a judgment rendered by the Circuit Court of Macoupin County; the Hon. JESSE J. PHILLIPS, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANTS' BRIEF, VICTOR M. GORE AND ANDERSON &
BELL, ATTORNEYS.

When an instrument is couched in plain terms, having a distinct and perfect idea, there is no room for construction. *Bowers v. Porter*, 4 Pick. (Mass.) 198; *Carr v. Jeannesett*, 2 McCord (S. C.) 66; *The People v. N. Y. Cen. Ry. Co.*, 24 N. Y. 485, 488.

"In construing a will the intention of the testator as manifested by the words used must prevail." *Banta v. Boyd*, 118 Ill. 186. "Where the meaning is clear from unmistakable language, the will interprets itself, and subsidiary facts are not to be introduced in order to create a doubt." *Huber's Appeal*, 80 Pa. St. 348. In the case of *Martindale v. Warner*, 15 Pa. St. 471, the Supreme Court of Pennsylvania says: "Technical rules of construction are only applicable to wills in cases of doubtful interpretation, and are never allowed to defeat a plain intent expressed." A will is to be so construed as to give effect to every part; so that in the construction every provision and every clause will be given its proper force and effect. *Bland v. Bland*, 103 Ill. 11; *Rountree v. Talbot*, 89 Ill. 249; *Burgan v. Cahill*, 55 Ill. 160.

In the event of repugnance between two provisions, effect will be given to the latter provision as against a former repugnant provision; and effect will be given to the full extent of the words used in the latter clause. In *McNeill v. Caruthers*, 4 Brad. (Ill.) 552, this court lays down the rule as follows: "It is a rule in the construction of wills that a latter clause which is repugnant to a former provision, is to be considered as an intention to modify or abrogate the former." To same effect see *Brownfield v. Wilson*, 78 Ill. 467, and *Osborn v. Bank*, 116 Ill. 130.

A testator is presumed, when he makes his will, to dispose of all his property. This presumption may be rebutted in

Hayward v. Loper.

many ways, but certainly in no way more effectually than by the provisions of the will. *Higgins v. Dwen*, 100 Ill. 554.

APPELLEES' BRIEF, L. P. PEEBLES AND RINAKER & RINAKER,
ATTORNEYS.

The legal presumptions against intestacy and double portions, require a contrary construction.

"The idea of any one deliberately purposing to die testate as to a portion of his estate and intestate as to another portion, is so unusual in the history of testamentary disposition as to justify almost any construction to avoid it." 2 *Redfield on Wills*, 235; 2 *Jarman on Wills*, 469, quoted in *Schofield v. Olcott*, 120 Ill. 362.

It is a rule of law that between two equally probable interpretations, that one is to be adopted which prefers a testator's heirs to a stranger or avoids intestacy. 2 *Woerner's law of Administration*, 883; *Taubenhan v. Dunz*, 20 *Brad.* 262; 125 Ill. 524.

"In the absence of a clearly expressed intention to the contrary, it will be presumed that the testator intended by will to dispose of his entire estate." 2 *Redfield on Wills*, page 464, Sec. 18; *Siddons v. Cockrell*, 131 Ill. 653; *Missionary Soc. v. Mead et al.*, 131 Ill. 338; *Higgins v. Dwen*, 100 Ill. 554; *Taubenhan v. Dunz*, 125 Ill. 524; *Jenks v. Jackson*, 127 Ill. 341.

"And so strong is this preemption, that the courts will adopt any reasonable construction to give a will effect to dispose of a testator's entire property, rather than to hold an intention to die testate in part, and intestate as to other property." *Schofield v. Olcott*, 120 Ill. 362; *Redfield on Wills* (Ed. of 1866), 442; *Hamlin v. U. S. Express Co.*, 107 Ill. 443; *Johnson v. Johnson*, 98 Ill. 564.

OPINION OF THE COURT, WALL, J.

This proceeding originated in the County Court on petition of the executors of Adriana W. Loper, deceased, for an order of distribution. The case was removed by appeal to the

Circuit Court where it was again heard and an order of distribution was made, from which an appeal has been prosecuted to this court.

Two questions are presented: 1st, as to the construction of the will and codicils; 2d, as to the construction of an instrument for the payment of money signed by Lodusky Hayward and payable to the deceased.

By the original will the testator disposed of his whole estate, giving his homestead with the household furniture, etc., to his wife for her natural life, a special legacy of \$3,000 to his daughter Lodusky, a special legacy of \$1,500 to his daughter Leni, the same to each of his two granddaughters, \$1 to his son Cruce, and the residuum of his estate, together with the wife's portion at her death, to be divided into three equal shares, one to his son Gideon B., one to his daughter Ophelia, and one to his daughter Adriana.

By another clause he specially declared that he desired the three last named children to share equally and alike in all his property after the payment of the special legacies. The will was dated May 27, 1873.

On the 22d of April, 1879, the testator executed a codicil in which, after reciting the provisions of the will as to the residuary legatees and devisees, he provided as follows:

“First. That the share of my son Gideon B. Loper be reduced the amount of fifty hundred dollars (\$5,000.)

Second. That the share of my daughter Ophelia, the wife of Henry Duckels, be reduced the amount of eighty hundred dollars (\$8,000.)

Third. That the share of my daughter Adriana, the wife of Charles Wright, be reduced the amount of thirty-six hundred dollars (\$3,600.)”

On the 20th of August, 1889, he made another codicil by which he gave his son Cruce a certain tract of land for his natural life, and after his death the same was to be divided between the heirs of the said Cruce, share and share alike.

It is insisted on behalf of the special legatees that the sums

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mentioned in the first codicil, of \$5,000, \$8,000 and \$3,600, to be reduced as to the several shares of Gideon, Ophelia and Adriana, aggregating \$16,600, were to be withdrawn from the residuum and to become intestate estate, and this presents the first question for determination.

We think it is quite apparent the testator had no intention to take such an amount from the residuary legatees, and leave it as an intestate property. He manifested a clear purpose to dispose of all of his estate by will. He had given to Cruce, before the original will was made, all he then intended him to have, and took his receipt for it, as he stated in the will.

For reasons satisfactory to himself he gave unequal amounts to his daughters Lodusky and Leni. He gave special sums to his granddaughters, and he made a special provision for his wife. Having done this he gave the residue to his three children—Gideon, Ophelia and Adriana, and added a seemingly unnecessary clause for the purpose of emphasizing his purpose that they were to have the entire residuum.

In the first codicil he recites in detail that he had given them each one-third part of his property, real and personal, after special legacies were paid, and manifests no desire to change this general provision for their benefit, merely providing that their respective shares should be reduced in unequal amounts.

Here was a recognition that each was to have a share—one-third of the residuum—but no hint that the aggregate of these unequal amounts was to be taken out of the residuum and regarded as intestate estate.

And finally, he made his second codicil, by which he gave his son Cruce the use of a certain tract of land for his life, with remainder to his children. All this is inconsistent with the idea of leaving \$16,600 intestate.

If we consider the effect of so doing the inconsistency is the more apparent.

One-third of the amount, over \$5,000, would go to his wife as her absolute estate, and the residue would be divided

into seven shares of something over \$1,600 each, thus adding one-half to the special legacy of Lodusky, doubling that of Leni and of the granddaughters, adding \$1,600 to Cruce, to whom he had given but \$1 for the reason stated, and giving the same amount to Gideon, Ophelia and Adriana. And further, it appears that this sum of \$16,600 would not remain after deducting the special legacies from the estate.

It is to be presumed that the testator would not have so miscalculated. He knew what his estate was worth, and if he had intended such a result as here shown, he would have used very different means to reach it. So absurd a result was certainly not in his mind as to provide for a residuum and at the same time to provide for a withdrawal therefrom of a larger sum than the residuum itself, to be left as intestate estate.

It is a familiar rule of construction, that a testator is presumed to intend to dispose of all his estate, and it has been said that "the idea of any one deliberately proposing to die testate as to a portion of his estate, and intestate as to another portion, is so unusual in the history of testamentary dispositions, as to justify almost any construction to avoid it." 2 Red. on Wills, 225; 2 Jar. on Wills, 469; Schofield v. Olcott, 120 Ill. 362. The reasonable presumption is, that after the making of the original will, the testator disposed of a portion of his estate and gave such portion, or its proceeds, to the residuary legatees, in the unequal amounts mentioned in the codicil, and that the reductions there stated were to be considered only as between them in equalizing their shares in the residuum, and that he did not intend to withdraw the aggregate from them and leave it undisposed of. Indeed, proof was offered which would have shown such a division of a part of his property, equal to the amounts "reduced" by the codicil, but the court declined to hear it, and this ruling is assigned as a cross-error by the appellees.

The briefs of counsel call our attention to a number of adjudged cases, which are supposed to throw light upon the main question.

We find but little benefit, or assistance, from adjudi-

cations in other cases, for the reason that the wills under consideration in those cases are unlike this and unlike each other.

We must therefore apply the general rules of construction, which are not the subject of disagreement between counsel, to the peculiar case before us, and reach such conclusion as seems most consonant with reason.

We are inclined to hold that the Circuit Court properly construed the will and the codicils, regardless of the proffered evidence, and it is not necessary to consider the matter assigned as cross-error.

The second question arises upon the action of the court, in granting the request of the executors to be allowed to pay the specific legacy to Lodusky Hayward, by surrendering to her a note held by the deceased, against her, for the amount of her legacy, \$3,000.

Soon after the execution of the will, the husband of Lodusky, residing with her then in Minneapolis, wrote to the deceased, suggesting that it would be agreeable to them to take whatever sum would be hers under the will and pay interest upon it during the life of the testator, and it was finally agreed that this should be done, and that she should give her note for the sum of \$3,000, payable at the death of the testator, with interest at eight per cent per annum. The rate of interest then obtainable in Minneapolis was higher and the arrangement was a good one for her, for that reason, if for no other.

The correspondence was all between her husband and the testator, but she admits in her answer to the petition that her husband was acting for her and with her consent.

The note was written at the dictation of the testator by his daughter Leni, and was signed by said Lodusky, as follows :

\$3,000. CHESTERFIELD, ILL., February 1, 1875.

——— after date I promise to pay to the order of A. W. Loper, note to run during my natural life, three thousand dollars, value received, with eight per cent per annum from date.

(Signed) LODUSKY L. HAYWARD.

It is now insisted on behalf of the maker, Lodusky, that it is not payable until her death, and that she is entitled to her legacy in money.

The words "note to run during my natural life," were dictated by the testator and were written, as testified by Leni, just as dictated, the word *my* being used where *his* was intended, or where that meaning was intended.

Lodusky admitted more than once that the note was payable at his death, and though she had promptly paid the interest for fifteen years she ceased to do so when he died. It was the intention of all parties that by this arrangement she was to secure her legacy in advance and to make the note payable at his death, not at hers. He was not skilled in the use of language, as is evident from the correspondence between him and Hayward and from other writings in proof, and there can be no doubt that by mere mistake the note was written as now appears.

It was not the intention that the money should be refunded, yet this would have been necessary had she died first, if the terms of the instrument are to be taken literally. The County Court had the requisite equity power to treat the note as the parties intended it in settling the estate, and the Circuit Court had similar power when hearing the case on appeal. We are of opinion the case was correctly decided by the Circuit Court, and the judgment will be affirmed.

Lucas v. City of Macomb.

1. *Cities and Villages—Peddler's License—Ordinances.*—An ordinance may be partly good and partly bad, when the parts are, in themselves, entire and distinct from each other. The difficulty is in determining whether the good and bad parts are capable of being separated.

2. *Ordinance—Void in Part, Void in All.*—A city ordinance enacted that "any person who shall, within the limits of said city, without procuring a license therefor, carry on the trade, business or occupation of (among others) peddler, shall on conviction thereof, forfeit to said city

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not less than \$5.00 nor more than \$200 for each offense," with a proviso "that no license shall be required for the selling of any articles manufactured and sold by *bona fide* residents of said city, or that are exempt from license by the statute of the State of Illinois, or for orders and sales at wholesale." It was conceded that the proviso was void, but contended that the proviso might be rejected and the rest of the ordinance upheld as valid. *It was held* that the proviso was so connected with the preceding portion of the ordinance, as a condition, consideration or compensation for it, as to warrant the conclusion that the parts were intended as a whole and that one part would not have been adopted without the other, and that the ordinance is void.

Memorandum.—Action for violation of an ordinance. Writ of error to the McDonough Circuit Court, rendered in that court to reverse a judgment in favor of the appellee; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the November term, 1892. Opinion filed March 6, 1893.

PLAINTIFF'S STATEMENT OF THE CASE.

On March 7, 1892, plaintiff in error was arrested by the marshal, on view, charged with violating one of its alleged ordinances, which prohibited peddling without a license.

He was subsequently tried before a justice of the peace, and fined \$5 and costs; an appeal was taken to the Circuit Court of McDonough; a jury was waived, the cause was there tried, and he was fined \$5 and costs.

PLAINTIFF'S BRIEF, GEO. D. SHERMAN & WM. W. TUNNICLIFF, ATTORNEYS.

"An ordinance can be partly good and partly bad only when the parts are, in themselves, entire and distinct from each other." 17 Am. and Eng. Ency. Law, p. 265.

"Must be impartial, fair and general, as it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so; ordinances which have this effect can not be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, so far as practicable, be exercised by ordinances general in their nature and impartial in their administra-

tion." Dillon, *Municip. Corp.*, Sec. 256; *Tugman v. City of Chicago*, 78 Ill. 405; *City of Chicago v. Rumpff*, 45 Ill. 90; *Hoefling v. City San Antonio (Tex.)*, 20 S. W. Rep. 85, June 20, 1892; *City of Lake View v. Tate*, 130 Ill. 247; *Mayor v. Althorp*, 5 Cald. 554; *Ex Parte Frank*, 52 Cal. 606, 28 Am. B. 642; *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. R. 553; *Ward v. State of Maryland*, 12 Wall. 418; *Lassen Co. v. Cone*, 17 Pac. Rep. 100; *St. Louis v. Spiegel*, 28 W. Rep. 839 (Mo. January 31, 1887); *Barthet v. City New Orleans*, 24 Federal Rep. 563; *Village of Braceville v. Doherty*, 30 Ill. App. 645; *Twining v. City of Elgin*, 38 Ill. App. 356.

If a statute or ordinance is in reality directed against certain persons who are engaged in a given business, or against certain commodities in such a manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such a statute or ordinance is not a police, but a trade regulation; a law that should prohibit all persons peddling goods manufactured in other States and permit the same persons to peddle goods of the same character manufactured in this State would be a trade regulation. So a law forbidding a peddler's license to a non-resident, but authorizing one to a resident citizen would be bad. *Borough of Sayre v. Phillips*, 24 Atlantic R. 76. (Pa. April, '92); *Webber v. Virginia*, 103 U. S. 344; *Ex Parte Thomas*, 12 Pac. Rep. 53 (Cal. Oct. '86); *Rogers v. McCoy*, 44 N. W. Rep. 99 (Dak. May '89); *Robey v. Smith*, 30 (Ind.) N. E. Rep. 1093.

It is a delegated power and must be strictly construed. Any reasonable doubt of the power of a municipal corporation to pass an ordinance will be resolved against it. 1 Dillon, *Munic. Corp.*, 55, 251; *Emmons v. City of Lewistown*, 132 Ill. 380; *Cooley*, *Taxation*, p. 574.

DEFENDANT'S BRIEF, H. H. HARRIS AND BAILY & HOLLY,
ATTORNEYS.

That a portion of an ordinance may be void while the balance may stand as a good and valid ordinance, is well settled in this State. *Kettering v. City of Jacksonville*, 50 Ill. 39; *Harbaugh v. City of Monmouth*, 74 Ill. 367; *Town of*

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Greenfield v. Mook, 12 Brad. 281; Poyer v. Village of Des Plaines, 123 Ill. 111; Baker v. Town of Normal, 81 Ill. 108.

When an ordinance consists of two or more separate and independent parts, the invalidity of one part does not affect the validity of the others. Am. and Eng. Encyclopedia of Law, Vol 17, page 265; Wilcox v. Hemming, 58 Wis. 144; S. C., 46 Am. Rep. 625; Dillon, Municipal Corporations, Vol. 1, par. 421.

The section of the ordinance in controversy and the proviso attached, are entirely separate and distinct. The section is complete in itself. It in no way depends upon the proviso. It defines the offense and fixes the penalty. The proviso might be eliminated and a perfect and complete ordinance would be left. In such cases a section or proviso of an ordinance may be void, and the balance held valid and binding. State v. Hardy, 7 Neb. 377; Cooper v. Dist. of Columbia, 4 McArthur (D. C.), 250; Warren v. Mayer, 2 Gray (Mass.), 84; Dillon on Municipal Corporations, 3d Ed. par., 420.

OPINION OF THE COURT, WALL, J.

The plaintiff in error was prosecuted before a justice of the peace upon a charge of violating an ordinance of the city of Macomb.

The case was removed by appeal to the Circuit Court where, a jury being waived, it was tried by the court. Judgment was entered in favor of the city, and the fine was assessed at \$5, to reverse which the present writ of error was sued out.

The ordinance relied on read as follows:

“Sec. 1. That any person who shall, within the limits of said city, without procuring a license therefor, carry on the trade, business or occupation of (among others) peddler, shall on conviction thereof, forfeit to said city not less than \$5 nor more than \$200 for each offense. Provided that no license shall be required for the selling of any articles manufactured and sold by *bona fide* residents of said city, or that are exempt from license by the statute of the State of Illinois, or for orders and sales at wholesale.”

It appeared by a stipulation of the parties that on the day charged in the complaint, the plaintiff in error carried with him and sold from place to place, within the city's corporate limits, certain bread knives, of three kinds and sizes, which were sold and delivered by him to various persons within said limits, who then paid him \$1 per set of three knives; that at the time of said sales and delivery plaintiff in error had not procured a license as required by said ordinance, and he was then and there engaged in peddling and was a peddler according to the usually accepted meaning of the term; that said city was duly incorporated under the general laws of the State of Illinois; that plaintiff in error at the time of the alleged offense resided in the city and county of Peoria, in the State of Illinois, and was a citizen thereof, and of the United States; that all of said knives were manufactured at the city of Dayton, in the State of Ohio, and by the manufacturers shipped to him at Macomb, Illinois, where the same were so sold.

It is conceded by appellee that so much of the ordinance as is contained in the proviso which exempts *bona fide* residents who may sell articles manufactured in the city, is void, but it is contended that this proviso may be rejected and the residue of the ordinance may be upheld as valid.

An ordinance may be partly good and partly bad when the parts are in themselves entire and distinct from each other.

In Cooley on Const. Lim., 2d Ed., p. 178, it is said: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it can not be presumed the legislature would have passed the one without the other.

The constitutional and unconstitutional portions may be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, and the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial;

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but whether they are essentially and inseparably connected in substance. * * *

The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect perfect and complete as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object, without the aid of the invalid part. And if they are so mutually connected with, and dependent on, each other as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

We are of opinion the proviso in question is so connected with the preceding portion of the ordinance as a condition, consideration, or compensation for it, as to warrant the conclusion that the parts were intended as a whole, and that the one part would not have been adopted without the other.

The suggestion is made that because the invalid portion is contained in the form of a proviso, there is no difficulty in rejecting it, and that there is then left a complete and perfect enactment. We perceive no force in the suggestion. The whole must be read together, and it is in effect as though the ordinance had simply provided that no non-resident person should be allowed to peddle any goods, nor should any person be allowed to peddle goods not manufactured in the city. *State v. Sheriff*, 51 N.W. 112 (Minn.); *City of Shreveport v. Levy*, 26 La. An. 671; *City of Chicago v. Brownell*, 41 Ill. App. 71; *Village of Braceville v. Doherty*, 30 Ill. App. 658.

We are of opinion the ordinance was void, and that judgment should have been for the appellant.

The judgment will be reversed and the cause remanded.

Coddington v. Hoblit.

1. *Practice—Technical Objections.*—A party desiring to urge an objection which is purely formal and technical must do so in the court below. It can not be urged for the first time in the Appellate Court; so held, where a party raised the question for the first time in the Appellate Court, that an action could not be maintained by an assignee of a written instrument because it was not assignable.

2. *Pleading—Fraud and Circumvention.*—A plea which attempts to set up fraud and circumvention in the execution of an instrument in writing, and the alleged false representations and fraud relied upon did not relate to the execution of the instrument, but solely to the consideration that moved the defendant to enter into it, is bad. The defense sought to be interposed by such a plea can only be sustained by fraud or circumvention in the execution of the instrument and not by proof of a failing, partial or total, of the consideration.

3. *Damages.*—In action upon a contract to convey lots, where the consideration was the construction and operation of a street car line and the conveyance of the lots, the damages can not be estimated from proof of the difference between the contract price and the market value of the lots at the time of the breach of the contract.

Memorandum.—Action in assumpsit. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Logan County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893

The opinion of the court states the case.

APPELLANT'S BRIEF, OSCAR ALLEN AND HARTS &
HUMPHREY, ATTORNEYS.

In order that an instrument may be assignable so that suit may be maintained in name of assignee, it must be payable absolutely and not on contingency. *Kingsbury v. Wall*, 68 Ill. 312; *Kelley v. Hemmingway*, 13 Ill. 604; *Baird v. Underwood*, 74 Ill. 176; *Husband v. Eppling*, 80 Ill. 174. And this is the rule as to otherwise non-negotiable paper even if made payable with the words "to order," (*Turner v. P. & S. R.*, 95 Ill. 134,) or with any other words, (*Bishop on Cont.*, Sec. 1179,) the only exception being covenants run-

ning with land, (Smith L. C. 6th Ed. Vol. 1-211, 181, 159, 140; Rawle Cov. 2d Ed. 340, 341,) unless maker promises assignee directly. Chitty Cont., 614, notes; Am. L. C. 4th Ed. 191.

Plea of fraud held proper in suit on written agreement, (Grier v. Puterbaugh, 108 Ill. 606,) and also in case of subscription. Rutz v. Esler & Ropiequet Co., 3 Brad. 83. Also as against promissory notes. Slack v. McLagan, 15 Ill. 249; Byles on Bills, 94, 95; Story on Bills, Sec. 185-190, and generally, Allen v. Hart, 72 Ill. 104; Bacon's Abridgment, Vol. 4-386 (10 Vol. Ed.); Jamison v. Beaubien, 3 Scam. 113; Lowry v. Orr, 1 Gil. 70; Rogers v. Brent, 5 Gil. 573; Am. & Eng. Enc. Law, Vol. 8, p. 635; Thompson on Trials, Sec. 244.

The demurrer was general, not special, so that the only question to be considered on demurrer was whether the facts set out in the special pleas were sufficient under any form of plea. Allen v. Breusing, 32 Ill. 508; Parson's Notes and Bills, 1-211, end of note "s;" Wheelock v. People, 84 Ill. 555.

The damages against a vendee of land refusing to carry out his contract, is the difference between contract price and value of land at time of breach. Old Colony R. R. v. Evans, 6 Gray (Mass.), 25; Sanborn v. Chamberlain, 101 Mass. 409; Sawyer v. McIntyre, 18 Vt. 27; Griswold v. Sabin, 51 N. H. 167, 12 Am. Rept. 76; Parsons Cont., Vol. 2, 232; Sedgwick Dam. 191.

Statute provides penalty for selling or offering to sell any lot in any addition to any city unless surveyed, acknowledged, certified to and filed. Rev. Stat. Starr & Curtis, Vol. 2, page 1766, Sec. 5. Where doing an act or making a contract is punished by penalty, if such contract is made, it is void. Bishop Cont. Sec. 471, and cases cited in note 4; Greenhood Pub. Pol. 530, Sec. CCCCLI-B, and cases cited; Petrel Guano Co. v. Jarnette, 25 Fed. Rep. 575; and to same effect when contract is any way prohibited. Wells v. People, 71 Ill. 532; Banking Co. v. Rautenberg, 103 Ill. 460; Penn v. Bornman, 102 Ill. 523; Miller v. Post, 1 Allen (Mass.) 434; Smith v. Arnold, 106 Mass. 269; Prescott v.

Battersby, 119 Mass. 285; Griffith v. Wells, 3 Den. (N. Y.) 226.

Where a contract sued on is under seal, all distinction between sealed and unsealed instruments is abolished, so far as pleading and defending is concerned. Rev. Stat. Ch. 110, Sec. 119; Adams v. Arnold, 86 Ill. 185; Dean v. Walker, 107 Ill. 546.

APPELLEE'S BRIEF, BEACH & HODNETT, ATTORNEYS.

If the assignor should have sued for the use of appellee, appellant can not for the first time make that objection in this court, as it could have been obviated by amendment, if made in the court below, and to avail of it appellant should have raised the question in the trial court, and assigned that error on the motion for a new trial. Lake Shore & Mich. So. Ry. Co. v. Ward, 35 Ill. App. 423; St. Clair Co. Ben. Soc. v. Fietsam, 97 Ill. 474; Start v. Moran, 27 Ill. App. 119;

Amendment is allowable at any time before final judgment, substituting a nominal plaintiff in the suit. McCall v. Lee, 24 Ill. App. 585; 120 Ill. 261; U. S. Insurance Co. v. Ludwig, 108 Ill. 514; Chandler v. Frost, 88 Ill. 559; McDowell v. Towne, 90 Ill. 359.

Where the objection is one that might have been obviated by amendment, if it had been seasonably made in the court below, it can not be urged for the first time in this court. Tug Boat v. Waldron, 62 Ill. 221; Zeigler v. Cox, 63 Ill. 48; Thompson v. Hoagland, 65 Ill. 310; Bowden v. Bowden, 75 Ill. 111; Railroad Co. v. Estes, 96 Id. 473; Utter v. Jaffray, 15 Brad. 236; Woods v. Hynes, 1 Scam. 103; Mulford v. Shepard, Id. 583; Depuy v. Schuyler, 45 Ill. 306; Clarke v. Johnson, 54 Ill. 296; Adams v. Woolbridge, 3 Scam. 254; Latham v. Smith, 45 Ill. 25; Shipley v. Carroll, Id. 285; Elliott v. Levings, 54 Ill. 213; Easter v. Minard, 26 Ill. 494; Andrix v. People, 9 Ill. App. 42.

The pleas of fraud and circumvention were bad, because they alleged fraud in relation to the consideration of the instrument, and not fraud in relation to the execution.

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Richelieu Hotel Co. v. Int. Mil. E. Co., 29 N. E. Rep. 1044; Woods v. Hynes, 1 Scam. 103; Mulford v. Shepard. Id. 583; Adams v. Woolbridge, 3 Scam. 255; Latham v. Smith, 45 Ill. 25; Shipley v. Carroll, Id. 285; Depuy v. Schuyler, Id. 306.

Penal statutes receive a strict interpretation. Chicago v. Rumpff, 45 Ill. 91; Raplee v. Morgan, 2 Scam. 561; Potter's Dwarris on Statutes, 245.

Where liabilities have been incurred in consequence of a subscription, the subscriber is bound. Hudson v. Green Hill Cem., 113 Ill. 618; McClure v. Wilson, 43 Ill. 356; Kinsley v. Int. Mil. En. Co., 41 Ill. App. 259; Id. 29 N. E. Rep. 1044.

It would certainly be unjust to the trial court to be held responsible for errors that were not brought to the attention of the court. It is the duty of the party insisting on alleged error to get the ruling of the trial thereon, and have the error corrected, if possible. If he fails to do so he can not insist on such error for the first time in this court. Mooney v. Moriarty, 36 Ill. App. 175; Greser v. The People, 36 Ill. App. 415; Lake Shore & Mich. So. Ry. Co. v. Ward, 35 Ill. App. 423; Start v. Moran, 27 Ill. App. 119; St. Clair Co. Ben. Soc. v. Fietsam, 97 Ill. 474.

OPINION OF THE COURT, BOGGS, J.

The appellant executed and delivered to one John F. Mundy, the following instrument:

LINCOLN, Ill., Feb. 11, 1891.

I hereby agree to, and with John F. Mundy, or his assigns, for and in consideration of his efforts to perform the conditions hereinafter mentioned to buy of him lots three and four, block eight, in Woodlawn addition to the city of Lincoln, Logan County, Illinois, at two hundred and fifty dollars per lot on the following terms and conditions: that if the said John F. Mundy, or his assigns, shall, within eighteen months from the date of this agreement, procure to be put in and established in the city of Lincoln, Illinois, a street car line of not less than three miles in length, and extending through Woodlawn addition to the city of Lin-

coln, on Oglesby avenue, and have said street car line in operation for the carriage of passengers, and said John F. Mundy, or his assigns, shall also within the time above mentioned, tender to me a good and sufficient deed conveying to me the fee title to the lots above described, clear of all incumbrances, I agree to receive said deed and pay to said John F. Mundy, or his assigns, the price per lot above mentioned.

Upon failure of above conditions, this contract is to be void as to both parties.

[SEAL.]

JAMES CODDINGTON.

Mundy assigned it to the appellee, who constructed and put in operation the street car line referred to, and tendered the appellant within eighteen months a good and sufficient deed, conveying to him an unincumbered fee simple title to the lots mentioned. The appellant refused to accept the deed, or to pay the sum of money stated in the writing to be paid. In this, an action of assumpsit upon the within instrument, the appellee, in the Circuit Court, upon a hearing before the court without a jury, recovered a judgment for the sum mentioned in the instrument, to be paid upon compliance therewith, together with five per cent interest from the date of the tender. Upon the trial the deed for the lots was again tendered to the appellants and filed with the clerk. The judgment of the court requires that the clerk shall deliver it to the appellant upon demand.

This is an appeal from such judgment. No propositions were presented to the court to be held as the law of the case.

It is first urged that the judgment should be reversed, because the instrument sued on was not assignable. This point was not made in the court below. Had it been, the objection, if good, could have been obviated by the introduction of Mundy as the nominal plaintiff. The terms of the instrument authorize the performance of its conditions by Mundy or any one to whom he might assign it, and in it is found the direct and express promise of the appellant to pay to Mundy or his assignee. If a right of action at law did not vest in the assignee, it is only because of the technical rule that such actions shall be instituted in the name

of the party having the legal right for the use of the real plaintiff. A party desiring to urge an objection so purely formal and technical, must do so seasonably. It can not be first mentioned in the Appellate Court.

Appellant's second plea averred that at the time of the execution of the instrument sued on, there was no such addition to the city of Lincoln as Woodlawn, and no such lots and blocks as are described in the writing, and his third plea recites that the statute of the State requires the proprietor of an addition to the city to survey and plat the addition, cause the plat thereof to be recorded before lots therein shall be sold or offered for sale, and avers that no such plat or survey had been made and recorded before the execution of the instrument in suit. It is assigned for error that the court sustained a demurrer to each of these pleas. Construing these pleas most strongly against the pleader, it is to be assumed that when the deed for the lots was tendered to him, the addition to the city had been legally completed. This being true, a recovery ought not to be denied upon the ground alone that it was not true when the writing was made.

It is evident from the face of the instrument, that the purpose of the appellant in executing it, was to secure the construction and operation of the street car line. To accomplish this, he was willing to obligate himself, and did obligate himself, to pay Mundy, or any one to whom Mundy might assign the obligation, the sum of \$500, upon the delivery of a deed for the two lots in Woodlawn addition, if the street car line should be completed and in operation through the same addition within eighteen months.

We think these conditions complied with, if the car line was constructed in accordance with them, and the addition to the city legally made, so that the lots could lawfully be conveyed when the appellant was entitled to a deed under the contract. A demurrer was sustained to appellant's fourth plea, and in this it is said error occurred.

This plea attempted to set up, as a defense, fraud and circumvention in procuring the execution by the appellant of

the instrument. The fraud and circumvention set out in the plea, and relied upon, consists of certain alleged false representations of Mundy as to the value of the lots and their qualities, when compared with certain other lots, and that Mundy falsely stated that certain other lots in the addition, which appellant preferred, had been sold, and for that reason the appellant could not contract for such other lots; and another alleged false statement, that no other lots in the addition had been sold for less than \$250; and that by reason of such misrepresentations, the appellant was induced to sign the instrument. There is no pretense in the plea that the appellant was in any way deceived as to the instrument he was signing, or that he did not fully understand it. The alleged false representations and fraud did not relate to the execution of the instrument, but solely to the considerations that moved the appellant to enter into the undertaking. The defense sought to be interposed by this plea can only be sustained by fraud or circumvention in the execution of the instrument, not by proof of the failure, partial or total, of the consideration. *Richelieu Hotel Co. v. Inter Military Enc. Co.*, 29 N. E. Rept. 1044.

It is urged that the proper measure of damages for the breach of the contract was the difference between the market value of the lots and the contract price. We think not.

The consideration was the construction and operation of the street car line and the conveyance of the lots; consequently, the damages could not be estimated from proof of the difference between the contract price and the market value of the lots at the time of the breach. If we are right in the view that the pleas were obnoxious to demurrer, it follows that the court properly refused to hear testimony as to the fraud and misrepresentations set up in the pleas.

Finding no error, the judgment must be, and it is affirmed.

49	78
101	578
101	587

Holcomb v. The People, etc.

1. *Intoxicating Liquors—Extract of Lemon.*—An article generally and properly known and used for culinary purposes, recognized, and a formula prescribed for its preparation as such, in standard dispensaries, prior to the enactment of the dram shop act, and not then known and classified among liquors used as a beverage, is not to be deemed an intoxicating liquor within the meaning of this enactment, simply because it contains alcohol, and may, or in fact, does, produce intoxication.

Memorandum.—Sale of intoxicating liquors. Appeal from a fine imposed by the County Court of Pike County: the Hon. EDWARD DOOCHEY, County Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, A. G. CRAWFORD, ATTORNEY.

The dram shop act is of a highly penal character, and should receive a strict construction; and in the construction of the statute the courts are not confined to a literal meaning of the words of the statute. An intention may be collected from the necessity or object of the act, and its words may be enlarged or restricted to its true intent. *Cruse v. Aden*, 127 Ill. 231; *Aden v. Cruse*, 21 Ill. App. 391; *Albrecht v. The People, etc.*, 78 Ill. 510; *Hogg v. The People*, 15 Ill. App. 288.

Whatever is generally and popularly known as a medicine or as an article for toilet or for culinary purposes, and which is recognized and the formula for its preparation prescribed in some standard authority (such as the United States Dispensatory) and is not among the liquors ordinarily used as intoxicating beverages, such as tincture of gentian, paregoric, bay rum, cologne and essence of lemon, is not within the statute notwithstanding such articles contain alcohol and will produce intoxication. *Black on Intoxicating Liquors*, 8; 25 Kas. Rep. 751; 37 Am. Rep. 284; *State v. Haymond*, 20 W. Va. 18; 43 Am. Rep. 787; *State v. Laffer*, 38 Iowa, 422.

APPELLEE'S BRIEF, W. E. WILLIAMS, AND A. BEAVERS,
ATTORNEYS.

The sale of an article called "pop," if of an intoxicating quality, is a violation of the law. So, in *Feldman v. The City of Morrison*, 1 Ill. App. 460, it is held a violation to sell "cider" of an intoxicating quality. In *Housberg v. The People*, it is held that "beer" may or may not be an intoxicant, and that the question is one of proof. Our courts have never held, to my knowledge, that the *name* or *use* of an article should determine the question as to whether it should be sold, but always that it should be determined from the character or quality of the article—is it an intoxicant? *Godfreidson v. The People*, 88 Ill. 284.

OPINION OF THE COURT, BOGGS, J.

This is an appeal from a judgment imposing upon the appellant a fine for alleged unlawful sales of intoxicating liquors. Counsel for the people in their brief say: "The case upon its merits presents a single issue, and that is whether extract of lemon may be sold without violating section 2 of the dram shop act."

An article generally and properly known and used for culinary purposes, recognized, and a formula prescribed for its preparation as such, in standard dispensatories prior to the enactment of the dram shop act, and not then known and classed among liquors used as a beverage, is not, we think, to be deemed an intoxicating liquor within the meaning of the enactment, simply because it contains alcohol, and may, or in fact does, produce intoxication.

This view is supported by the cases collected in Vol. 37 American Reports, page 284. (Intoxicating Liquor cases.) See also Black on Intoxicating Liquor, chapter 1, Sec. 8. Extract of lemon, it appears from the evidence, is such a preparation, and it is not to be deemed as within our statute, simply upon proof that it contains alcohol in sufficient quality to produce, and does produce, intoxication. There is no proof that the sales of extract of lemon, of which the

Pullman Palace Car Co. v. Lee.

appellant was convicted, were mere shifts or devices to avoid the penalties or evade the provisions of the dram shop act.

The judgment must be and is reversed and the cause remanded.

Pullman Palace Car Co. v. Lee.

1. *Railroad Companies—Rules—Sleeping Cars.*—A rule of a railroad company requiring a passenger to have a first class ticket for his transportation before he can be assigned to a berth in a sleeping car, is a reasonable one and can be legally enforced.

2. *Ejection of Passenger from Sleeping Car—Act of Railroad Company.*—A passenger holding a second class passage ticket for his transportation over the lines of a railroad company purchased a sleeping car ticket and gained admission to the sleeping car before the matter was discovered. Holders of second class railroad tickets not being permitted to travel in the sleeping car by the rules of the railroad company, he was ejected by the railroad's employees, assisted by the servant in charge of the sleeping car. In a suit for damages, *it was held* that the expulsion from the car was the act of the railroad company and not of the sleeping car company.

3. *Railroad Companies—Expulsion of Passenger—Show of Force.*—Where a passenger upon a railroad train is ordered to leave the car he is in by the servants of the railroad company, and does so, his right, if any he has, remains the same as if he had been expelled by force from the car.

Memorandum.—Action for damages. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Cumberland County; the Hon. EDMUND D. YOUNGBLOOD, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

The opinion of the court states the case.

J. S. RUNNELLS and WILLIAM BURRY, attorneys for appellant.

HORACE S. CLARK and LEVI N. BREWER, attorneys for appellee.

OPINION OF THE COURT, WALL, J.

The appellee recovered a judgment for \$200, against the appellant.

It was alleged in the declaration that on the 16th of October, 1887, the plaintiff was a passenger on the Pennsylvania Railway, from Indianapolis to Jersey City, having paid his fare to the railroad company, and that he had purchased a ticket from defendant entitling him to ride in defendant's sleeping car between the points above named; that he was shown to his place in the sleeping car by the servants of the defendant, and that the defendant afterward, in violation of his rights, refused to accept the sleeping car ticket or to allow him to ride in said sleeping car, and forcibly removed him therefrom.

The sleeping car ticket expressly provided that it was "good for this date and car only when accompanied by a first class railroad ticket." The plaintiff's railroad ticket was a second class ticket, and he had purchased it at a lower rate than was asked for a first class ticket. The evidence tends to show that he knew it was a regulation of the railroad and sleeping car companies that admission to sleeping cars could not be had on second class tickets, and, whether he so knew or not, such was proved to be the rule. It is not very doubtful, however, that he knew it.

It also appears that it was not customary to sell sleeping car tickets to persons who were not in possession of first class railroad tickets, though it sometimes happened in the rush preceding the immediate departure of a train that sleeping car tickets would be sold without requiring purchasers to exhibit their railroad tickets. It appears from the plaintiff's proof that he exhibited his railroad ticket to the agent of whom he purchased the sleeping car ticket—and this is not directly disproved. There is some attempt to deny that the railroad tickets have been identified, but there is no ground for this position.

It may be assumed that by some means the plaintiff, having and exhibiting a second class railroad ticket, purchased a sleeping car ticket on which was printed the limitation as to its use above stated. He was admitted to the sleeping car and shown to the berth called for by the ticket, but when the sleeping car conductor examined the railroad ticket he

was informed that he could not ride in the sleeper on that ticket. The railroad conductor soon came and made a similar statement, saying that the railroad ticket was good only in the smoking car. Plaintiff was informed that he could ride in the sleeper by paying the difference between first and second class fare, but he declined to do so and was required to leave the sleeper. He declined to go without some show of force, whereupon a brakeman, who had been sent by the railroad conductor for the purpose, took him by the arm and led him out of the car while the sleeping car conductor laid his hand upon the shoulder of plaintiff's companion (who was situated as he was in respect to tickets) and the two then took their seats in the smoker.

No actual violence was used or was necessary, as the parties seemed to think it sufficient that they were thus required to go out of the car.

Their rights would have been as complete, if they had complied with the order without the show of force as with it. The conductor of the train had the power to enforce his order, and the plaintiff would have lost nothing by going peaceably and without physical coercion, nor could he gain anything by requiring the application of force, really or apparently, to compel him to go. *Penn Co. v. Connell*, 112 Ill. 295.

While the subject was under discussion in the sleeping car, plaintiff or his companion asked that the money paid for the sleeping car tickets should be refunded, which the sleeping car conductor then declined to do, but afterward, having consulted his instructions and thought of the matter further, went forward to the parties and offered to take up the ticket and refund the money, but they declined the offer.

It appears that the railroad company by its arrangement with the sleeping car company, gets the fare of the passenger for being transported over the road, and that the sleeping car company gets only the pay for the sleeping car accommodations.

The sleeping car and the conductor and porter in charge of it are under the control of the railroad conductor, whose authority is complete.

The railroad company will not permit any person to ride in the sleeping car without a first class ticket, and while it is immaterial to the sleeping car company, yet under its arrangement with the railroad company, it is in duty bound to comply with this regulation, and to refuse to assign a berth to one holding a second class ticket. Whether it does so or not, however, the railroad company has the power to enforce the rule.

Therefore, when the sleeping car conductor informed the plaintiff that the railroad ticket was not good in that car, he was merely doing his duty. It can make no difference that the sleeping car ticket was inadvertently sold to the plaintiff when he had only a second class railroad ticket. At the most, the plaintiff could only ask to surrender his sleeping car ticket and for a return of his money paid for it, and he should have done this in apt time.

If he refused to do this when he had the opportunity he can not complain. He alleged in this declaration, and he was bound to prove, that he was entitled to ride in the sleeper, and that he was unlawfully put out. He failed to prove this allegation; indeed his own evidence disproved it. It appears that the plaintiff was accompanied by Mr. Brody, his attorney, the trip to New York being upon legal business. These men were not inexperienced. They were, probably, familiar with the ordinary usages of modern travel, and as before stated, it is not doubtful from the proof, that they knew a second class railroad ticket is not accepted in sleeping cars. But whether they did or not, the regulation existed, and on being advised of it, they were bound to comply with it.

Had they examined they would have seen the limitation printed on the face of the ticket, and must have known they could not use it with their second class railroad tickets.

If they realized the situation for the first time when they were informed of it by the sleeping car conductor, they were still bound to comply with the regulation, and seek redress to the extent of having the money refunded, provided the sleeping car company was in fault for having sold the sleeping car ticket under the circumstances.

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Whether it was so in fault we need not now determine, because, as already noticed, the plaintiff refused to surrender the ticket and receive back his money. All this assumes the regulation referred to is a proper one, as to which there seems to be no serious difference of opinion between counsel.

It does not appear to be an unreasonable rule. Indeed, it is probably necessary to protect the railroad company against the misuse of second class tickets, for without it passengers could buy second class tickets, and get the sleeping car accommodations for about the price of first-class tickets, thereby decreasing the sale of the latter. This to the detriment of the railroad company, and to the advantage of the sleeping car company.

It is also urged that the ejection of plaintiff was, in law and in fact, the act of the railroad company and not of the appellant company. It was so ruled in the case of *Lawrence* against the same sleeping car company, 144 Mass. 1. There, a regulation of the railroad company denied the passenger the privilege of riding in the sleeping car on the railroad tickets which he had, and the sleeping car conductor refused to sell him a berth for that reason and no other, and co-operated with the railroad conductor in urging him to leave the car, and in finally assisting the latter conductor in the "show of force" which the passenger was waiting for before he would go.

The testimony here seems to present such a case, as to the authority under which the removal was effected. Hence, by the same reasoning, it was really the act of the railroad company, for which the appellant company is not answerable.

But if it can be regarded, in a legal sense, as the act of the latter, there is no reason for saying it was an unlawful act.

We are of opinion the plaintiff failed to establish the cause of action alleged. The judgment will be reversed and the cause remanded.

Watkins v. Petefish et al.

1. *Sale and Delivery.*—Where there was a contract of sale, but the following facts relied upon as a delivery: Claimant was a creditor of his brother, against whom an attachment was issued. Shortly before the attachment was issued, he took some cattle to apply on his debt. He then proposed to take some horses, then in the pasture of a third party, at a figure which his brother thought too low, but next day sent his hired man to tell him that he could have them at the price mentioned. The creditor told the hired man he had no way to get them there, and the hired man said he would deliver them to him if he would pay him, etc. The hired man went to the pasture, took the horses, and started to deliver them, but on the way stopped at his employer's, the debtor brother, with the horses, intending to take them to the creditor brother next day, but while there, they were taken on the attachment. On the question of delivery, the court held that the law requires an open, visible change of possession, and that it would open a wide door to fraud if the law which requires a change of possession could be met by such proofs as these. The delivery was insufficient.

Memorandum—Attachment and interpleader. Appeal from a judgment in favor of the defendant, rendered by the Circuit Court of Cass County: the Hon. LYMAN LACEY, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

The opinion of the court states the case.

HENRY PHILLIPS & A. A. LEEPER, attorneys for appellants.

APPELLEES' BRIEF, R. W. MILLS, ATTORNEY.

The only question submitted to the jury was as to the delivery of the horses in controversy. If they were not actually delivered before the levy of the writ of attachment the creditors must hold them. *Lewis et al. v. Swift*, 54 Ill. 436.

Whether there was such delivery is a question of fact and was properly submitted to the jury upon instructions.

OPINION OF THE COURT, WALL, J.

The appellant claimed as his property, six horses levied upon by the sheriff under a writ of attachment, issued at the

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instance of appellees against Elijah Watkins, a brother of appellant. Upon a trial by jury the issue was found against the appellant, and judgment was entered accordingly, from which an appeal has been prosecuted to this court. The only question was, whether the horses had been sold and delivered to the appellant by the attachment defendant, prior to the levy. There was a contract of sale, but we think the evidence fully warrants the finding that there was no delivery. When the levy was made the horses were in the stable lot of the attachment defendant. It appears that the appellant was a creditor of his brother, Elijah, for a considerable amount; that shortly before the attachment was sued out, he took some cattle of him to apply on the debt, and that he then proposed to take these horses (then in the pasture of a third party) at a certain figure which the debtor thought too low. The next day Elijah sent word by his hired man, Eads, to the appellant that he could have the horses at the price offered. Appellant said to Eads that he had no way to get them there, and Eads said he would deliver them to him if he, appellant, would pay him for so doing, and appellant told him that would be all right.

Eads then went to the pasture where the horses were, several miles distant, and took them to the premises of Elijah, intending, as he says, to take them to appellant the next day, but the levy was made that night.

Appellant claims that Eads was his agent and that when the levy was made the horses were in his possession because his agent, Eads, had done as stated.

When Elijah authorized Eads to carry his acceptance to appellant, he did not discharge Eads from his service. Eads had no right to give any time or service to appellant without the consent or direction of Elijah, his employer, and appellant could not, by the means supposed, make Eads his agent. Eads could not serve two masters at the same time.

It would be a play upon words, a mere perversion of terms, to say that, under the circumstances, Eads was the agent of appellant, and that the latter thereby had possession of the horses.

The law requires an open, visible change of possession. Here the animals were actually on the premises of the attachment debtor. It would open a wide door to fraud if the law, which requires a change of possession, could be met by such proof as appears in this case. It is suggested that the court erred in admitting some of the statements of the witness Mertz, though it is conceded the testimony had no bearing upon the pivotal question before the jury. We see no error of importance in this respect.

The instructions for the attachment creditor are not subject to complaint by appellant, and, indeed, we do not understand from the brief that any objection thereto is seriously urged.

We are satisfied with the judgment and it will be affirmed.

Kelly et al. v. Gonce et al.

1. *Wills—Construction, etc.—Intention of the Testator.*—The intention of the testator must prevail and govern, and all mere rules of construction must give way to such intention, unless it is absolutely inconsistent with some settled rule of law.

2. *Wills—Intention of the Testator—Estates.*—The intention of the testator is to be gathered from the language of the will, which is to be read in the light of the well and long-established rule that in the absence of a clear manifestation of the intention to the contrary, estates shall be held to vest at the earliest period.

3. *Estates—Postponement of the Vesting.*—It is familiar law that an intent to postpone the vesting of an estate must be clear and manifest, and must not arise by mere inference of construction.

4. *Wills—Evident Intention Must Prevail—Omissions, etc.*—If a testator overlooks an event which he would have probably provided against, had it occurred to him, it is not the province of the court to supply the omission by implying or inserting a clause disposing of his property, according to some supposed or probable intention of the testator.

5. *Legatees—Gifts to Children.*—The law draws a distinction between a gift to such children as shall arrive at legal age and a gift to children to be paid when they arrive at legal age. In the first instance the gift is contingent because it can not be known at the death of the testator, whether a donee will be found at the proper period of time to take, while in the latter instance the donee is known at the time of the testa-

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tor's death, the gift settled upon him and its payment only deferred. When the donee is known, the gift is said to vest an interest at once, and though such donee does not survive to take possession, his interests and right of possession passes upon his death to his legal representatives. When no gift is to be found beyond a mere direction to distribute or divide at a certain stated period or upon the happening of some event, the rule is different.

Memorandum.—Construction of will. Appeal from a decree rendered by the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANTS' BRIEF, CONKLING & GROUT, ATTORNEYS.

The term "said children," in said will, refers to her children by him, who arrive at majority, and the court will observe that no gift is made to "said children" until their arrival at majority is specified, except that a gift is made her for family support.

In *People v. Jennings*, 44 Ill. 488, where the will provided for distribution of proceeds of sale of real estate among certain children, and in case of their death, to their children, the court held that nothing vested until the time of distribution, and the grandchildren took the proceeds instead of the personal representative of the son.

In *Ridgeway v. Underwood*, 67 Ill. 419, where the bequest was to survivors of a class, the court held it meant those who survived from the period of distribution, and did not speak from testator's death, and that children dying after testator, and before distribution, took nothing. See also *Scofield v. Olcott et al.*, 120 Ill. 373.

They were to receive nothing until they "ceased to be minors," either by "advancement" or "sale," and nothing is bequeathed to their heirs in case of their death before period of distribution.

APPELLEES' BRIEF, McGUIRE & SALZENSTEIN, ATTORNEYS.

The governing principle in the construction of wills is, that the intent of the testator, where it can be ascertained from the will, controls. The doctrine is equally well estab-

lished that "the law favors the vesting of estates, and courts will always give such a construction to a will as will tend best to provide for descendants and posterity, and will prevent the disinheritance of remainderman, who may happen to die before the termination of the precedent estate." *Byrnes v. Stillwell*, 103 N. Y. 353, 57 Am. Repts. 706, and cases there cited. Or as announced by the Supreme Court of the United States: "For many reasons, not the least of which are, that testators usually have in mind the actual enjoyment, rather than the technical ownership of the property, and that sound policy, as well as practical convenience, requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America, that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event." *McArthur v. Scott*, 113 U. S. 340; see also *Scofield v. Olcott*, 120 Ill. 362; *Nicoll v. Scott*, 99 Ill. 529; *Scofield v. Olcott*, 120 Ill. 362, at pp. 370 and 371; *Bowling v. Dobyn*, 5 Dana (Ky.), 441.

Every remainderman may die without issue, before the death of the tenant for life. It is the present capacity taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when it also may happen before the expiration of the estate limited in remainder, the remainder is vested. (4 Kent, 203.) It is also vested when it is limited to a person *in esse* and ascertained, to take effect by words of express limitation on the determination of the preceding particular estate. *Preston on Estates*, 70; see also, *Doe v. Considine*, 6 Wall. 474; *Ruffin v. Farmer*, 72 Ill. 615; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315-325; *Scofield v. Olcott*, 120 Ill. 372; *Jarman on Wills*, (Bigelow's Ed.) p. 833, 836; *Brown v. Lawrence*, 3 Cush. 397; *Cropley v.*

Kelly v. Gonce.

Cooper et al., 19 Wall. 167; Goebel v. Wolf, 10 Am. St. Rept. 470 to 477; Carver v. Jackson, 4 Pet. 1.

But if this were held not to vest until the death of the parents, this inconvenience would follow: that it would not go to the grandchildren, for if a child were born, who died in the lifetime of his parents leaving issue, such grandchild could not take, which could not be supposed to be the intention of the testator. Doe v. Perryn, 3 T. R. 495.

OPINION OF THE COURT, BOGGS, J.

Henry T. Kelly died in Sangamon County in May, 1886, seized of 140 acres of land. He left surviving him his second wife, Margaret, and five children born of her, to wit: Walter F., Ida F., Mary L., Henry Lewis, and Gertie. He also left surviving him Martha Gonce and Rachael Bancom, daughters by a deceased wife.

Henry Lewis Kelly died in November, 1886, unmarried, intestate, and without issue, when about twenty-three years of age; Gertie died in August, 1890, unmarried, intestate, and without issue, before arriving at the age of eighteen years.

The widow, Margaret, married one Vaughn, who died before her, and to them was born one child, Samuel C. Vaughn; Margaret died June 20, 1891.

The will of Henry T. Kelly, after bequests to Martha Gonce and Rachel Bancom (daughters of his first wife) "each the sum of two dollars out of my personal estate in addition to amounts previously given them," is as follows:

"I give and bequeath to my wife, Margaret, the use of all my real estate and personal estate that may remain after the above bequests, during her natural life, to support herself and her children born of her by me, and the education of said children, authorizing my said wife to advance each of her said children on their arrival at majority such amount as she may deem compatible with her comfort and the rights of her other children, taking the receipt of each for amount advanced. I give and bequeath to each of the said children of my wife, Margaret, an equal share of all the net proceeds

of my real estate that may remain after paying the debts and funeral expenses of my said wife, Margaret, provided that the real estate shall not be chargeable with any such debts; provided, also, that the amounts advanced to said children shall be counted as a part of said remainder and shall be charged to the recipient thereof in the final distribution. I direct after the death of my said wife, my real estate to be sold and distribution made among her said children as they cease to be minors, according to the foregoing provisions. I desire my wife, Margaret, to have possession and control as above without bonds or letters of administration."

After the death of Margaret this, a bill in chancery, was filed to obtain sale of the lands mentioned in the will, and distribution of the proceeds of such sale to the parties entitled thereto. A decree was rendered ordering sale to be made and the proceeds distributed, upon the theory that the interests of Henry Lewis and Gertie, both deceased, became vested at the death of the father and descended to their legal representatives under our statute of descent.

Walter F., Ida F. and Mary L., the only children of the testator and Margaret who survived the mother, insist the bequest of the proceeds of land is to the children of the testator and Margaret as a class; that the right of each of said children to take, was contingent upon the death of the mother, and upon the coming of age of the legatee; and that upon the death of the mother the entire bequest inured to them as survivors of the class. For this reason they prosecute this appeal from the decree of distribution.

In support of this view, counsel for appellants insist that it is clear that the testator did not intend that his children by a former wife should have anything beyond the bequest of two dollars each, and equally clear that he intended that the proceeds of the land should go to such of his children born of Margaret, as should survive her and live to reach legal age. It is true that the intention of the testator should prevail and govern, and all mere rules of construction must give way to such intention, unless it is absolutely incon-

sistent with some settled rule of law. This intention is, however, to be gathered from the language of the will, which is to be read in the light of the well and long established rule that in the absence of a clear manifestation of the intention of the testator to the contrary, estates shall be held to vest at the earliest period. It is familiar law that an intent to postpone the vesting of an estate must be clear and manifest, and must not arise by mere inference or construction.

It is argued that it clearly appears from the will, that the testator framed it upon the theory that he was providing for the children of the first wife and those by the second wife as different classes of persons, and that he intended the legacies to go to them as members of each class and not as individuals. The small sums given each daughter of the first wife, in the view of the appellants, signifies that the testator intended the remainder of his property to go to the children of Margaret. May it not be as well said, that the testator held all his children in equal regard and entertained for all a like affection, and desired each should share equally in his property, and that he estimated that each of the daughters of the former wife had already received as much as the other children would each receive under the provisions of the will, and that if he had anticipated the death of one of the children of Margaret, without leaving heirs, he would have provided for the disposition of the share of such deceased child, so that all his offspring would share equally in his bounty. There is nothing, however, in the will, to indicate that the testator ever thought of the death of one of the children, while a minor. Had he anticipated such an event and attempted to provide for the disposition of the share of such child, can it be said that it is known from the will, what he would have done? Appellants say, manifestly he would have given the share of such deceased child to the surviving children of Margaret. Suppose such deceased child had married before arriving at legal age and left a child or children; would any one find, in the language of this will, any indication of a desire on the part of the

testator to disinherit such grandchild or children and devote the property of the parent to the surviving uncles and aunts of such grandchild or children? Or if the testator entertained like affection for his children without regard to whether they were born to him of the first or second wife, as seems so natural and reasonable he would, is it not probable he would, when providing for the disposition of the share of one who might die childless, so order the distribution of such share as to divide his bounty equally between all his offspring? It is difficult to say what he would have done in such a contingency, and can not be determined by us as mere matter of inference or conjecture.

Counsel for appellants cite cases supposed to support the view they desire to have accepted by the court, but in each of such cases the decision is directed and controlled by the language of the will, as in *People v. Jennings*, 44 Ill. 488, where the express terms of the will directed that the share of a child who might die before the time fixed for the distribution of the legacy, should go to such children as "he might leave," and in *Ridgeway v. Underwood*, 67 Ill. 419, where the will provided that the proceeds of land which was to be sold after the expiration of the life estate given the widow should be divided among seven children, and that the share of any one "who should die, be divided between the remainder of the seven."

In the will at bar, no words are to be found signifying the desire of the testator in such an event.

"If a testator overlooks an event which he would probably have provided against, had it occurred to him, it is not the province of the court to supply the omission by implying or inserting a clause disposing the property according to some supposed or probable intention of the testator. 2 Roper on Legacies, 1464."

The persons to whom the remainder is limited by the will, though not designated by name, are definitely known. The bequest is to "each of the said children of my wife Margaret, an equal share of all the net proceeds of my real estate." It is insisted, however, that the right of each of

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these children to take is made uncertain and contingent by the following clause of the will, viz.: "I direct that after the death of my wife, my real estate be sold and distribution made among her said children as they cease to be minors." This clause, it is said, manifests that it was the intention of the testator that only such of the children as lived to reach legal age should receive any portion of the proceeds of the sale of land, and that therefore the right of any one to take was contingent and not vested. There was no contingency as to the sale of the land. It must take place upon the death of the mother, and in the course of nature her death would certainly occur. The gift to each child, then, was absolute and fixed and vested in interest at the testator's death, unless the directions of the testator in reference to the distribution of the proceeds of the sale created a contingency which made the donee of the gift uncertain. A distinction is to be drawn between a gift to such children as shall arrive at legal age, and a gift to children to be paid when or as they arrive at legal age. In the first instance the gift is contingent because it can not be known at the death of the testator whether a donee will be found at the proper period of time to take, while in the latter instance the donee is known at the time of testator's death, the gift settled upon him, and its payment only deferred. When the donee is known the gift is said to vest in interest at once, and though such donee does not survive to take possession of the subject-matter of the gift, his interest and right of possession passes upon his death to his legal representatives. *Raffin v. Farmer*, 72 Ill. 615; 20 American & Eng. Ency., page 851; *Illinois Land Co. v. Bonner*, 75 Ill. 315.

When no gift is to be found beyond a mere direction to distribute or divide at a certain stated period, or upon the happening of some event, the rule is different. In the will at bar the proceeds of the sale of the land is bequeathed to persons so designated as to be definitely known, namely, to each child of Margaret, without regard to his or her age, an equal share.

A subsequent paragraph provides for the sale of the land

after the death of the mother, and for the retention of the share of each child in the proceeds until he or she shall arrive at legal age.

We see nothing in the language of this paragraph to indicate that the testator intended to effect the gift otherwise than to fix a time for the payment of the bequest so that the donee should not enter into possession and control of the gift at an immature age.

“If futurity is not annexed to the substance of a gift, but has relation to the time of payment only, the gift vests at once.” 1 Jarman on Wills, 833-836-839.

The decree must be and is affirmed.

McSherry v. McSherry.

1. *Alimony—Contempt of Court—Failure to Pay.*—A decree for alimony may be made, by express terms, a lien upon real estate, as well as by virtue of the statute, but this will not deprive the court of the power to enforce payment by attachment for contempt of court. Such power will not be exercised, however, when the failure to pay is through mere inability and is not willful.

Memorandum.—Appeal from an order of imprisonment for an alleged contempt of court, entered by the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, 1892, and affirmed. Opinion filed March 6, 1893.

APPELLEE'S STATEMENT OF THE CASE.

Appellee filed her bill for divorce against appellant on the ground of cruelty, adultery and habitual drunkenness. The jury found the defendant guilty of extreme and repeated cruelty, and on this verdict she was granted a decree of divorce and the care and custody of the three children. She was given by her decree, the use and occupation of the homestead, and alimony to the amount of \$187 a year to be paid quarterly. The defendant owned, besides the homestead, a store building worth \$6,000, mortgaged for \$2,800. He re-

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received as rent for the store building \$50 per month, drew a pension of \$8 per month, and received as bartender \$50 per month, working from one-half to one-third the time.

This suit was an action for contempt in not paying the first year's alimony of \$187. During the year the appellant received as rent \$600, as pension \$96, as bartender at least \$250, a total of \$946. The court found the defendant in contempt and ordered him committed until he complied with the order and paid the alimony due. From this order the defendant appeals.

APPELLANT'S BRIEF, OSCAR A. DELEUW AND F. D. McAVOY,
SOLICITORS.

This record does not disclose a willful disobedience, nor a present ability to pay, and the order of imprisonment must be reversed, "as the decree in behalf of complainant was made a lien on the land." This quotation is from *Andrews v. Andrews*, 69 Ill. 609, which decides that in such case it is error to award an attachment against the body, where the decree, as in this case, expressly makes the alimony allowed a lien on appellant's land.

APPELLEE'S BRIEF, CHAS. A. BARNES, SOLICITOR.

Courts possess power to commit for contempt, to compel obedience to decrees for the payment of alimony. *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Buck v. Buck*, 60 Ill. 105; *Wightman v. Wightman*, 45 Ill. 167; *Blake v. The People*, 80 Ill. 1.

OPINION OF THE COURT, WALL, J.

This is an appeal from an order of the Circuit Court, committing appellant to jail for contempt, in failing to pay the sum of \$187, as alimony, adjudged against him in a decree of divorce, at the suit of appellee.

The decree is a lien upon the real estate of the appellant, by express terms, and by virtue of the statute, but this does not deprive the court of the power to enforce payment by

attachment for contempt. *Wightman v. Wightman*, 45 Ill. 167; *Buck v. Buck*, 60 Ill. 105; *O'Callaghan v. O'Callaghan*, 69 Ill. 552.

This power will not be exercised when the failure to pay is through mere inability and is not willful.

In many cases the defendant may have unincumbered real estate and no income of sufficient amount to enable him to comply with the decree, and there it will usually be proper to leave the complainant to her remedy by process against the property.

In this instance the defendant had an income sufficiently large to make it apparent that he could easily have paid the amount. His real estate, except that included in the homestead property, which was by the decree assigned to the possession of complainant, was incumbered, and if the complainant had been forced to resort to that means of collecting the money, she would perhaps have been placed at a serious disadvantage.

Whether she could have made the money by selling the real estate or not is unimportant, if the defendant was able to pay, and would not.

We are satisfied such was the case. It is argued that the complainant did not need the money, but this is not to the point. She was entitled to it, and the defendant being able to pay, willfully refused to do so.

The court properly exercised its coercive power and the order should be affirmed.

Illinois Live Stock Insurance Co. v. Baker.

1. *Limitations—Waiver of Conditions in a Policy.—Pleading—Burden of Proof.*--When a policy of insurance contains a limitation clause of six months, and the declaration in a suit brought upon it after the expiration of the six months averred that the company had waived this clause by requesting the assured not to sue, *it was held*, that under a plea of the general issue, the burden of showing the waiver was upon the plaintiff.

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2. *Pleading—Demurrer.*—Where the declaration in a suit upon a policy of insurance containing a clause limiting the bringing of suits upon it to six months, avers, by proper allegations, that the company had waived the clause, a plea of the statute of limitations founded upon this clause, pleaded after the general issue, is bad as amounting only to the general issue.

3. *Pleading a Waiver.*—It is not necessary for the plaintiff to aver in his declaration upon a policy of insurance a waiver of the limitation; he may wait for the defendant to set up this matter by a special plea and then reply a waiver by the company.

4. *Waiver of Limitations.*—Where a policy of insurance contained a limitation upon the right to sue, and the company, within the period so limited, requested the assured not to sue, and its president represented that the company was not then able to pay, but would be after a while, and if the assured would wait he should be paid, and he did wait, *it was held*, that by such acts, the company had waived its right to rely upon the limitation.

5. *The Limitation Can Not Be Revived after a Waiver.*—After an insurance company has waived the right to rely upon a clause of limitation contained in its policy, such a waiver can not be recalled or revoked. If any substantial part of the time provided by the limiting clause is lost by reason of the waiver, the limitation is wholly gone. It can not then be revived, nor can the plaintiff be required to sue, within any time short of the statutory limitation.

Memorandum.—Action of assumpsit upon a policy of insurance. Appeal from a judgment rendered by the Circuit Court of McLean County; the Hon. THOMAS J. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANT'S STATEMENT OF THE CASE.

On the 7th day of July, 1886, appellee procured from appellant an insurance in the sum of one thousand dollars upon a stallion owned by appellee. The policy provided that no action against appellant for the recovery of any claim by virtue of said policy should be maintained unless such action should be commenced within six months next after the date of the death of the animal insured, and should any action be begun against appellant after the expiration of said six months, the lapse of time should be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding. The policy ran from the 17th day of July, 1886,

to the 17th day of July, 1887. On the 11th day of February, 1887, the horse mentioned in the policy died. Suit was begun, by appellee, on the policy, in the early part of the year 1892.

In order to avoid the effect of the six-month limitation clause, appellee set forth in his declaration that on the 15th day of January, 1888, "and more than six months next after the death of said animal, appellant, by its then president, waived its right to have said suit brought within said six months by promising to pay the amount for which the animal was insured."

APPELLANT'S BRIEF, KERRICK, LUCAS & SPENCER AND J. B. MANN, ATTORNEYS.

After the lapse of six months, any promise, which, if made within six months, would have operated as a waiver of the limitation clause, was without consideration, and therefore void. In other words, such waiver did not put the plaintiff in a condition where he was likely to lose any of his rights. It did not cause him to lose any right he then had, because he was already barred. The doctrine of estoppel can not therefore be invoked. May on Ins., Sec. 482.

APPELLEE'S BRIEF, ROWELL, NEVILLE & LINDLEY, ATTORNEYS.

"When an insurance company shall, by fraud, or by holding out responsible hopes of an adjustment, deter a party assured, being under such a condition to sue, he honestly confiding in the pretenses and promises of the assurer, the condition would be no bar, but in such cases there should be proper averments in the declaration of the fact." Peoria Marine and Fire Ins. Co. v. Whitehill, 25 Ill. 475; F. & M. Ins. Co. v. Chesnut et al., 50 Ill. 117; Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 475; Andes Ins. Co. v. Fish, 71 Ill. 620; Illinois Fire Ins. Co. v. Stanton, 57 Ill. 362.

OPINION OF THE COURT, WALL, J.

This was assumpsit upon an insurance policy issued by the company upon a horse, belonging to the plaintiff.

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The policy contained a limitation clause of six months, and the declaration averred that the company waived this clause by requesting the plaintiff not to sue.

In the first count the request was alleged to have been made after the six months had expired; in the second count it was alleged to have been made within that time. The defendant pleaded non-assumpsit, and several special pleas. The first special plea set up as a defense that the suit was not brought within six months, and the action of the court in sustaining a demurrer to that plea is assigned as error.

The declaration sought to avoid the bar of the limitation clause by averments showing a waiver, and it is conceded in the argument that if these averments are sufficient, the special plea amounted only to the general issue, and was unnecessary. Hence, there was no error prejudicial to the defendant in sustaining a demurrer to the plea.

In *P. M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466, it is said that if an insurance company, "by fraud, or by holding out reasonable hopes of an adjustment, deter a party assured, being under such a condition to sue, from commencing his suit, he honestly confiding in the pretenses and promises of the assurer, the condition would be no bar, but in such case there should be proper averments in the declaration of the facts."

In *Andes Ins. Co. v. Fish*, 71 Ill. 620, the court adhere to the position that the limitation may be waived by such acts of the insurance company, but say it is not indispensable that the declaration should aver the facts; that the same rule of pleadings should be allowed in respect to this as to other limitations of actions, and that the limitation should, if insisted upon, be set up by plea, when the plaintiff may reply the facts relied upon, as excusing what would otherwise have been *laches* in bringing the suit.

It is, therefore, not necessary for the plaintiff to insert averments in his declaration to avoid the bar, but he may do so if he chooses, and in such case the general issue will put him upon proof of the waiver. The special plea was

wholly unnecessary in this case. All the facts relied upon by the plaintiff in excuse of the delay were necessarily provable in order to make out the case alleged.

We think he clearly proved the waiver as alleged in the second count. All the promises and hopes held out by the company were within the six months and there is no doubt that plaintiff was thereby delayed from suing. It is urged that before the six months expired, he was informed by the president of the company that he could not make anything if he did sue, because the company was insolvent, and that if he had a reasonable time then left within which to sue, he should have done so. In other words, that the waiver may be revoked and the limitation revived. We are inclined to agree with the Circuit Court on this point, and to hold that if there was once a waiver, it could not be recalled or revoked. If any substantial part of the time provided by the limitation is lost by reason of the waiver, the limitation is wholly gone. It can not be revived, nor can the plaintiff be required to sue within any time short of the statutory limitations. It is probably true that the suggestion of insolvency was to prevent the bringing of the suit. From the beginning, the president of the company represented to the plaintiff that the company was not then able to pay, but probably would be after a while, and if plaintiff would wait, he should be paid; and plaintiff, relying on this, did wait until the company became solvent. It is objected that the court of its own motion held a proposition to the effect that the question of limitation was not in issue, there being no plea of the statute of limitation. We suppose the court intended thereby to say that only the question of waiver was involved. Strictly speaking, the question of limitation was involved by the averments of the declaration.

Whatever may have been the view of the court as to this merely technical matter, we are of opinion the merits of the case were with the plaintiff, so clearly that the judgment ought not to be disturbed. Affirmed.

Mahoney v. Whyte et al.

1. *Rewards—Pursuit of Criminals.*—When officers of the law, stimulated by a reward offered for the apprehension of a criminal, pursue such criminal from place to place, and finally locate him, and employ a local officer to make the arrest, such local officer is not entitled to the entire reward, on the ground that he made the actual seizure of the criminal.

2. *Misrepresentations.*—The fact that officers who had been in the pursuit of a criminal for whom a reward was offered, falsely stated to a local officer, whom they employed to arrest the criminal, the crime for which he was to be arrested, and did not tell his true name, is no reason why the local officer making the arrest should be entitled to share in the reward.

3. *Falsehood and Deceit—Moral and Legal Wrongs.*—Falsehood and deceit are always subject to moral condemnation, but it is not appointed to human tribunals to sit in judgment upon mere moral delinquencies or abstract wrongs, affecting only the conscience; such tribunals take cognizance of delinquencies and wrongs, only when another has been induced by them to do some act to his own injury. Deceit and fraud, if not acted upon, or not accompanied by injury, are moral, not legal, wrongs.

Memorandum.—Bill of interpleader filed by the County of Jersey to require different claimants for a reward for the arrest of a criminal, to litigate their respective claims. Appeal by the defeated claimant, from the decree, entered by the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, THOS. F. FERNS, ATTORNEY FOR PATRICK MAHONEY.

Where one gives such information to an officer as enables the latter to capture a fugitive from justice, even if he go with the officer and act as one of his posse, he does not thereby become entitled to recover a reward offered by the county for the capture and delivery of the criminal to the county jail. *County of Juniata v. McDonald*, 122 Pa. St. 115; *S. C.*, 15 Atl. Rep. 696; *Adair v. Cooper*, 25 Tex. 548; *Clan-*

ton v. Young, 11 Rich. (S. C. Law R.) 546; Shuey v. United States, 92 U. S. 73; Everman v. Hyman, 28 N. E. Rep. 1022.

Nor is the informant in an action entitled to recover the reward, or any part of it, from the person making the arrest and delivery of the person wanted. Fallick v. Barber, 1 M. & S. 108.

The law makes a distinction between officers having the warrant to execute, and those making an arrest without the warrant, as to recovering a reward for such arrest. Smith v. Whildin, 10 Pa. St. 39; 49 Am. D. 572; Davis v. Munson, 43 Vt. 676; 5 Am. R. 315.

APPELLEES' BRIEF, J. S. CARR, ATTORNEY.

Where persons acting with a view of earning a reward offered for the apprehension of an individual charged with a crime, acquire a knowledge of facts necessary to effect such apprehension, and the conviction of the accused, and under such circumstances as the evidence in this case clearly discloses, procure the assistance of another to make the actual seizure of the accused as their agent or employe, and impart to such employe or agent all the information necessary to effect such apprehension, such persons are entitled to the reward when earned. First Nat. Bank v. Hart, 55 Ill. 62, 70.

When one employs another to pursue or arrest an individual accused of crime, and for whose apprehension a reward is offered, such employer is entitled to such reward if thus earned. The County of Montgomery v. Robinson, 85 Ill. 174; C. & A. R. R. v. Sebring, 16 Ill. App. 184.

OPINION OF THE COURT, BOGGS, J.

The appellant and the appellees were rival claimants to a reward of \$500, offered by the county of Jersey for the arrest and delivery to the sheriff of that county of one S. A. Shaw, who stood charged with the crime of murder.

The appellee Whyte, a resident of Jersey County, having information that Shaw, under the assumed name of McReynold, was in the employ of the appellee Johnson, at Ash

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Hill, Mo., went there to arrest him for the purpose of securing the reward, but Shaw had absconded before his arrival.

He advised Johnson of the identity of Shaw and of the offered reward, and they entered into an agreement to search for the accused and if successful to share the reward between them.

They interested with them one Leach, from whom they learned that Shaw had assumed the name of A. J. Perry, and was working in a box factory near Cairo. Whyte, Johnson and Leach went to Cairo and called at the police headquarters to procure an officer to make the arrest. There they first met the appellee, Mahoney, who was the city marshal of Cairo. They told him they desired to have one A. J. Perry, who was at the box factory, arrested upon a charge that he had committed a rape in East St. Louis.

Mahoney agreed to send, and did send an officer to the box factory to make the arrest, but Shaw was not to be found. The appellees continued to prosecute their search, and soon after, through Leach, learned that Shaw would return to Cairo about six o'clock on a certain Saturday evening, and would stop at the Farmer's House, a hotel on the levee in that city.

Accompanied by Leach, they again called upon the appellant, Mahoney, and arranged to have him arrest Shaw, whom Mahoney still knew as A. J. Perry, charged, as Mahoney supposed, with rape. Mahoney was furnished by the appellees with a minute description of Shaw, and told when he would return to Cairo, and where he could be found when he came.

Whyte, Johnson and Leach all testify that Mahoney agreed that he would make the arrest and notify the appellees to come for the prisoner, and would be reasonable in his charges, and said it was his official duty to make the arrest.

Shaw returned to Cairo on the day that the appellees had told Mahoney he would, and was arrested by Mahoney while making his way from the steamboat, from which he had just landed, up the levee to the Farmer's House. Mahoney had never met Shaw before, but identified him by the de-

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the appellees, and because he expected a reward at that place.

The next day for the first time that the State had arrested was Shaw, not Perry, against him was murder, and not rape. There might be a reward for his arrest, and knowing the appellees that he had Shaw, he Secretary of State, asking if a reward had been informed in reply that it had.

Knowing confident that Shaw would return to the hands of the officer, came to Cairo for the arrest on Saturday, armed with a gun, and took Shaw to Jersey County.

He refused to deliver the prisoner to them, but Jersey County, surrendered him to the appellees, and the entire reward, as did also appel-

lees, filed by the county of Jersey to litigate their respective claims. The State awarded the reward to Mahoney, Whyte and Leach in equal shares. Mahoney prosecutes this decree, insisting that the entire amount should be paid to him.

He is oppressed with the justice of Mahoney's claim.

He was in the discharge of an official duty when he offered a reward having been offered. He acted with a view of earning the reward. The criminal was secured through the industry of the appellees and Leach, and not with the view of obtaining the offered reward. He spent time and expended money in following Shaw, and thus acquired a knowledge of the effect his apprehension. The only connection with the affair was to attend at a trial called by the appellees and make the arrest. This he did in an official capacity. The reward should be credited, upon

a distinct understanding that he was to receive reasonable compensation therefor.

After he had thus performed his official duty, he learned for the first time, of the offered reward; and though he had performed no service with the view of earning it, and knew that the prisoner had come into the custody of the law through the diligence and labor of the appellees, who were working for the reward, he determined to demand that they be denied all compensation and he awarded the entire sum.

This assumption savors so strongly of selfishness, and is in such utter disregard of the appellees' right, that it is not strange it obtained no recognition from the chancellor.

The fact that the appellees did not tell the appellant the true name of the man they desired to secure, and that they falsely stated the charge or crime for which he was to be arrested, is relied upon to support the appellant's right to the whole reward. Such misrepresentations and concealment constituted, it is argued, a conspiracy to perpetrate a fraud upon the appellant, whereby the appellees would obtain his services and they reap the sole benefit thereof.

Falsehood and deceit are always subject to moral condemnation, but it is not appointed to human tribunals to sit in judgment upon mere moral delinquencies or abstract wrongs, affecting only the conscience. Such tribunals take cognizance of delinquencies and wrongs only when another has been induced by them to do some act to his own injury.

Deceit and fraud, if not acted upon, or if not accompanied by injury, are moral, not legal wrongs. 5 Am. & Eng. Ency. page 331.

The appellees were under no obligations, either legal or moral, to disclose the identity of Shaw, or to make known the fact that a reward was standing for his arrest.

The appellant, as city marshal, was invested with such power to make arrests as constables had at the common law, or have under our statutes. Sec. 73, Ch. 24, R. S.

He understood it to be his official duty to make the

arrest and did so for that reason, and not because of any misrepresentations made to him. Nor were the misrepresentations made for the purpose of inducing him to act. The purpose of the deceit was to keep concealed the fact that a reward might be obtained. As the appellant did not act nor suffer injury by reason of the deceit and concealment, he has no legal ground to complain of it.

The decree of the learned judge to whom this case was submitted was, "that each of the claimants were so associated in procuring the apprehension and delivery of Shaw, that each was entitled to an equal share in the reward."

If any one has good right to complain of the conclusion thus reached, it is not, in our opinion, the appellant.

The decree must be, and is affirmed.

Youle v. Brown.

1. *Verdict*.—Where there is evidence to support the finding of the jury, it will not be disturbed.

2. *Juror's Improper Conduct*.—An affidavit based upon information and belief, is insufficient to support an objection to a verdict on the ground that the jury arrived at their finding by setting down on separate pieces of paper, the amount each juror was willing to allow, and dividing the aggregate by twelve.

Memorandum.—Breach of warranty. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANT'S BRIEF, CHARLES M. PEIRCE, ATTORNEY.

A verdict arrived at by lot or chance can be impeached by the affidavit of jurors in all of the following States: Ark. Dig. Stat. 1874, Par. 1979; Cal. Code Civil Prac., Par. 657; Texas Code Cr. Prac. 1879, Art. 777, Par. 3-8; Polhemus v. Heiman, 50 Cal. 438; Fain v. Goodwin, 35 Ark. 109; Cowperthwaite v. Jones, 3 Dall. (U. S.), 55; Harvey v. Jones,

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3 Humph. (Tenn.), 157; Crabtree v. State, 3 Sneed (Tenn.), 302; Ry. Co. v. Winters, 85 Tenn. 240; Fuller v. Ry. Co., 31 Iowa, 211; Johnson v. Hubbard, 22 Kan. 277; Hunter v. State, 8 Tex. App. 75.

A quotient verdict is illegal; see Joyce v. State, 7 Baxt. (Tenn.) 87; Haught v. Hoyt, 500 Conn. 583; Johnson v. Hubbard, 22 Kas. 277; Leverett v. State, 3 Tex. App. 213; Tinkle v. Dunivant, 16 Lea (Tenn.), 503; Miller v. Ry. Co., 5 Mo. App. 471; Roy v. Goings, 112 Ill. 656.

APPELLEE'S BRIEF, ROWELL, NEVILLE & LINDLEY, ATTORNEYS.

"Jurors may resort to a process of taking the sum of the amounts in the mind of each juror and dividing by twelve, as a matter of experiment, and for the purpose of ascertaining how nearly the result obtained may suit the views of the different jurors." City of Pekin v. Winkel, 77 Ill. 58.

"The subsequent polling of the jury and their separate answers relieves the verdict of all "objection," even in a case where it should be shown that there was a preliminary understanding that the result found by the process adopted should be the verdict. City of Pekin v. Winkel, 77 Ill. 58; Roy v. Goings, 112 Ill. 656.

"It is error to permit the jurors to testify or be questioned (before they are discharged) as to the mode in which they arrived at the amount of damages." Roy v. Goings, 112 Ill. 656.

In the case of City of Pekin v. Winkel, 77 Ill. 56, the verdict returned by the jury was for \$275.16 $\frac{2}{3}$, and it was decided by the opinion in that case that the fact that the verdict contained a fraction of a cent was no evidence that the verdict was a chance verdict.

OPINION OF THE COURT, WALL, J.

The appellee recovered a judgment against the appellant upon an alleged breach of warranty in the sale of a mare.

It appears from the evidence that on the 9th of February, 1892, there was a public sale of horses at the premises of one Crawford. After a number of horses belonging to Crawford had been sold, the animal in question, belonging

to appellee, was led out by a son of Crawford, and was put up for sale and was finally struck off to the appellant.

The testimony offered by appellee tends to prove that Crawford stated in reply to a general question by the auctioneer that the mare was all right, and that in reply to a particular question put by appellee when he was about to bid, whether her wind was sound, he said, "the mare is sound and all right." After the mare had been struck off to him, the appellee learned for the first time that she was the property of appellant, who was present, and he then inquired particularly of the latter as to the mare's wind and received the same assurance. The following day and before the money was paid and the property was delivered, this assurance was given again. The testimony for the appellant strongly tends the other way as to all this. The mare proved to be wind-broken, and there is testimony tending to show appellant knew it. This he also denied, although he had owned the mare a considerable time.

The jury settled the question of fact adversely to appellant. It was probably correct. We find no reason to interfere with the conclusion thus reached. It is suggested in the brief of appellant that the court erred in giving certain instructions asked by appellee and in refusing certain instructions asked by appellant.

No particular objections are pointed out as to the former. As to the latter, we find on inspecting the record, that a large number of instructions, not set out in the abstract, were given for appellant. Upon reading the whole series given on both sides, we are of opinion the appellant has no occasion to complain. Nor do we find any important error in the rulings of the court on the admission of evidence.

It is objected that the jury arrived at their verdict by an improper method, viz., by setting down on separate pieces of paper the amount each juror was willing to allow, and dividing the aggregate by twelve. The affidavit offered in support of this objection was insufficient in that it was based upon information and belief merely. *City of Pekin v. Winkel*, 77 Ill. 58.

The judgment will be affirmed.

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Maney, Administratrix, etc. v. Chicago, Burlington & Quincy R. R. Co.

49	105
55	589

49	105
69	262

1. *Railroad Companies—Signals.*—The object of the statute in requiring signals to be given when approaching highway or street crossings, is to protect persons or animals about to cross the track, and to obviate the danger of collision at such crossings. The giving of these signals is a statutory duty, the non-performance of which is negligence as a matter of law, only when injury results therefrom to persons or animals endeavoring or intending to cross the track of the railroad upon a street or highway.

49	105
100	1499

49	105
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49	105
109	479

2. *Railroad Companies—Omission to Give Signals—When Negligence in Fact.*—If a person in the vicinity of, but not intending to use a crossing, may hold a railroad company for injuries caused by a failure to give the signals, the liability must grow out of peculiar facts and circumstances, by reason of which the injured party had a right, in the exercise of ordinary care, to rely upon, and wait for the signals, and making the omission to give them, negligence in fact as to him.

3. *Pleading—What is a Sufficient Release.*—A plea which in substance avers that in his lifetime the deceased (being an employe of a railroad company) made application for insurance in a branch of the company called its "relief department" and was accepted as a member, and received a certificate of membership entitling his widow, as a beneficiary, to receive a sum of money in case of his death, and that it was provided in his application for such membership that the acceptance from such department by his beneficiary should operate as a release of all claims for damages which could be made by his heirs, executors or administrators; that after the death of the said employe it paid to his widow as such beneficiary the sum named in the certificate, which she accepted, and the company became thereby released from all claim for damages of the legal representatives of the deceased, etc., is bad for the reason that the said deceased had no power to release the company from payment of damages to his widow and next of kin in case of his death by neglect or default of the company.

4. *Railroad Companies—Power of Employes to Contract Against Liability in Case of Death.*—Exemption can not be secured by contract against liability for the consequences of gross negligence, or a willful act.

5. *Death by Negligent or Willful Act—Common Law Liability.*—At the common law a person injured by a wrongful act, neglect or default of another, might, if the injuries were not fatal, maintain an action to recover damages, but the remedy abated upon the death of the person injured. So, if instantly killed, no right of action existed, and no action would lie in favor of any one for causing the death of a human being.

6. *Husband and Wife—Statutory Remedies.*—The glaring absurdity of the common law in allowing a husband and father if injured and not killed, a right of action for the damages thus sustained, and in denying to his widow and children any compensation for damages inflicted upon them, should the injury be greater and result in death, has been relieved by the act of our General Assembly, approved February 12, 1853, re-enacted in 1874, and now constituting Secs. 1 and 2, Ch. 70, of our Revised Statutes.

7. *Husband and Wife—Next of Kin—Statutory Doctrine.*—The enactment of our statute established the doctrine that the wife and next of kin, and each of them, have a property right and financial interest in the life of the husband and relative. A new right of action was created in favor of persons who, before, had neither right, cause of action, nor remedy. Prior to its enactment, this right ceased at the death of the husband; it did not flow from him, but was created by the statute. The widow and the next of kin can not be deprived of it at the will or pleasure, or by the contract of another, though he be the party charged with the performance of the duties out of which the right grew.

8. *Husband and Wife—Power of the Husband to Release the Wife's Right.*—The value of the interest of the wife and children in the life of the husband and father, and the amount of their financial loss in case of his death, is limited by statute, and it is wholly beyond the power of the husband and father to further limit their right of recovery, by any contract he may enter into.

9. *Damages—Expenses, etc.*—The recovery is limited to the financial or pecuniary loss of the wife and next of kin by the death of the husband and father; the expenses incurred or paid for medical attendance, care or nursing, or otherwise, in the endeavoring to effect a cure. The agony and pain suffered and endured by him, the loss of earnings while sick or disabled by the injury, can not be considered in estimating the amount of damages. The sole measure of damages is the pecuniary loss to the widow and next of kin, occasioned by the destruction of the life of the husband, etc.

Memorandum.—Action for personal injuries. Writ of error to the Circuit Court of Cass County, to reverse a judgment rendered by that court; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

PLAINTIFF'S BRIEF, MILLS & McCLURE, ATTORNEYS.

It is believed that the question presented by this record has never been adjudicated by any of the courts of last resort in this State; but the analogous principle, that a contract indorsed on the back of a railroad pass, releasing a railroad company from all liability to prospective injuries, is

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not a sufficient answer to a charge of gross negligence, is firmly settled by a long line of decisions. I. C. R. R. Co. v. Read, 37 Ill. 484; Arnold v. I. C. R. R. Co., 83 Id. 273; J. S. E. R. R. Co. v. Southworth, 135 Id. 250. Other courts, however, have considered the controlling question in this case. R. R. Co. v. Spangler, 44 Ohio State 471; Cook v. W. & A. R. R., 72 Ga. 48; M. & C. R. R. Co. v. Jones, 2 Head. 517; Thompson on Negligence, Vol. 2, p. 1025; Roesner, Admx., v. Hermann, 8 Fed. Rep. 782.

DEFENDANT'S BRIEF, SWEENEY & WALKER, AND A. A. LEE-
PER, ATTORNEYS.

An employe, as well as every other person, can make a contract which will be binding upon his administratrix, and that such contract may also operate upon his "next of kin" and prevent a recovery under the statute, must be conceded. Annas, Adm'x, v. M. & N. R. R. Co., 67 Wis. 46; Griswold, Adm'r, v. N. Y. & N. Eng. R. Co., 53 Conn. 371; State, to use of Black, v. B. & O. R. Co. (Md.), 36 Fed. Rep. 655; Russell v. R. & D. R. Co. (S. Car.), 47 Fed. Rep. 204; W. & A. R. R. Co. v. Strong, 52 Ga. 461.

The object and purpose of the "Relief Department" is thoroughly in accord with the spirit and legislation of the times; they will always be sanctioned and upheld by the courts. Fuller v. B. & O. Employe's Relief Association, 67 Md. 433; Owens v. B. & O. R. R. Co. (Ohio), 35 Fed. Rep. 715; State, to use of Black, v. B. & O. R. Co. (Md.), 36 Fed. Rep. 655; Freshes v. B. & O. R. R. Co., not reported; Spitze v. B. & O. R. R. Co. (Md.), 23 Atl. Rep. 307; Martin v. B. & O. R. R. Co. (W. Va.), 41 Fed. Rep. 125; Graft v. B. & O. R. R. Co. (Pa.), 8 Atl. Rep. 206.

O. F. PRICE, of counsel.

OPINION OF THE COURT, BOGGS, J.

This is an action on the case brought in the name of Mary Maney, as administratrix of the estate of Daniel Maney, deceased, for the benefit of Mary Maney, widow, Rosa A.,

Daniel M., Mary J., Albert L. and Francis L. Maney, children of the deceased, to recover damages under the provisions of sections 1 and 2 of chapter 70 of R. S., for the killing of said Daniel Maney. The declaration contained five counts. A demurrer to the fifth, and a motion to strike out certain allegations in the fourth count, were sustained, to which the plaintiff below and here excepted. The defendant below, who is defendant here, filed the general issue and seven special pleas. The plaintiff interposed a demurrer, both general and special, to each of the special pleas. These demurrers were overruled as to all the special pleas except the eighth, and to these rulings of the court the plaintiff excepted. The defendant withdrew the general issue; the plaintiff abided their demurrers and judgment against the plaintiff for costs followed. This is a writ of error brought to reverse the judgment.

The fifth count charges that defendant's servants in charge of and operating one of its locomotive engines, failed and omitted to give the signals required by the statute when approaching a street crossing. Other allegations of the same count are that the deceased was struck by the engine and killed at a point on the track between two streets, and was not upon a crossing nor seeking to pass over the track at a crossing. The object of the statute in requiring signals is to protect persons or animals about to cross the track and to obviate danger of collision at highways or street crossings. Non-performance of this statutory duty is negligence as a matter of law, only when injury results therefrom to persons or animals endeavoring or intending to cross the track of the railroad upon a street or highway. *Roden v. C. & G. T. Ry. Co.*, 133 Ill. 73. If one in the vicinity of, but not intending to use a crossing, may hold a railroad company liable for injuries caused by a failure to give the statutory signals, the liability must grow out of peculiar facts and circumstances, by reason of which the injured party had a right in the exercise of ordinary care to rely upon and wait for the signals, and making an omission to give them, negligence in fact as to him. *Patterson Railway*

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Accident Law, Sec. 161, 162. No such state of case is attempted to be made by this count.

The demurrer to this count was, therefore, properly sustained. The averment of the fourth plea that the defendant company, in consideration of the conveyance of a tract of land, and the vacating of certain streets in the city, had agreed to do no switching above Sixth and Eighth streets, brought a wholly irrevelant issue into the case, and was properly stricken from the plea. The second, third, fourth, fifth, sixth and seventh pleas are in substance the same, the averments being that in his lifetime the deceased made application for insurance in a branch of the defendant company, called its "Relief Department;" that he was accepted as a member, and received a certificate of membership, number 1394, entitling his widow, Mary Maney, to receive \$2,500 in case of his death; also that it was provided in said application that the acceptance of any benefits from the relief department by the beneficiary named in the application should operate as a release of all claims for damages, which could be made by his heirs, executors or administrators; that after the death of the said Daniel Maney the defendants paid (or caused to be paid) to the beneficiary named in said certificate, \$2,500, which she accepted, and the defendant thereby became released from all claims for damages which the legal representative of deceased might make against it.

By sustaining the pleas as against the demurrer, the court, in effect, ruled that Daniel Maney had power to release the appellant company from payment of damages to his widow and next of kin, in case his life should be thereafter lost by neglect or default of the company, and did so, in consideration of the obligation of the "Relief Department" of the appellant to pay Mary Maney, his wife, the sum of \$2,500 in case of his death from any cause, and further, that the payment of such sum to Mary Maney, constituted a complete defense to this action.

The plaintiff in error insists that the declaration, and each count thereof, charges that the death of Daniel Maney was caused by the gross negligence, or willful, intentional act of

the servants of the defendant, and that it was beyond the power of either the deceased or the defendant to contract against a liability thus arising. That exemption can not be secured by contract against liability for the consequences of gross negligence or a willful act, is well settled. *Arnold v. I. C. R. R. Co.*, 83 Ill. 273; *J. S. & E. R. R. Co. v. Southworth*, 135 Ill. 250.

We do not, however, think that the allegations of either the first, third or fourth counts ought to be construed to charge either gross negligence or the infliction of a willful injury. Though words are found in each count implying more, the facts and circumstances set forth only amount to actionable negligence.

The second count in effect and in words charges that the servants and agents of the defendant "negligently and willfully drove the locomotive with great force and violence against said Daniel Maney, and he was thereby instantly killed."

A willful act is one designedly or intentionally done. *Bouvier's Law Dictionary*; see *Bishop Crim. Law*, Vol. 1; Sec. 4 28 (7th Ed).

The second count, we therefore hold, charges not only inadvertent failure to use ordinary care in the management and control of the engine, but also that the engineer willfully and intentionally drove the engine against the deceased and killed him. Each of the pleas purport to answer the whole declaration, but as in neither is the charge of intentional injury denied, the second count of the declaration remains unanswered, the contract of the deceased being insufficient to exempt the defendant from damages for a willful injury. As the pleas purport to answer the whole declaration, and fail to present a defense to the second count, they are obnoxious to the demurrer, and for this reason, if no other, the court erred in overruling the demurrer.

It is apparent that the material question desired to be submitted by the parties, and which must arise again in the disposition of the case by the Circuit Court, is whether the

facts alleged in the pleas constitute a defense to such counts as charge only actionable negligence; that is, an inadvertent failure to use reasonable care, or the omission of statutory duty.

It appears, from the pleas, that the defendant company had organized a "voluntary relief department," under the operations of which a "relief fund" was accumulated, to be applied to the relief of its employes who might fall sick, or receive injuries while in its employ, or in payment of a death benefit in case of death, whether caused by violence or resulting from sickness, and that the deceased voluntarily applied for membership in the 5th class in such "relief department," and became, and was, a member at the time of his death. That he signed an application for such membership in writing, in which was incorporated the following stipulation: "That in consideration of the amounts paid, and to be paid, by said company (the defendant), for the maintenance of the relief department, the acceptance of benefits from said relief fund, for injury or death, shall operate as a release and satisfaction of all claims for damages against the said company arising from such injury or death, which could be made by me or my legal representatives."

The pleas aver that the application for membership was approved by the superintendent of the relief department and a certificate of membership issued to the deceased, obligating the defendant, in case of his death, to pay Mary Maney, his wife, the amount of his death benefit, and that said Mary Maney, pursuant to the rules and regulations of the "relief department," presented her claim for the death benefit, under the certificate of membership, and received, and was paid out of said relief fund, the sum of \$2,500, being the amount of such benefit to a member of the 5th class. It is to be observed that it is not averred in any of the pleas that Mary Maney presented the claim as administratrix, or that the payment was to her in that capacity. It is then to be presumed that she was acting as an individual in applying for and receiving the money, as pleas are to be construed against the pleader.

The stipulation in the application and the payment of the money to Mary Maney, constitute, it is urged, a release and payment of all liability, and a complete defense to all right of recovery in this action.

Without stopping to inquire whether the contract is in contravention of public policy, we proceed to other grounds of objection to the pleas, which we think fatal to their sufficiency. .

At the common law a person injured by the wrongful act, neglect or default of another, might, if the injuries were not fatal, maintain an action to recover damages therefor. The remedy thus allowed did not survive, but abated upon the death of the person injured. If instantly killed, no right of action existed. The concurrence of common law decisions is, that no action would lie in favor of any one for causing the death of a human being. Cooley on Torts, page 16.

There was no recognition in the principles of the common law of a pecuniary interest possessed by others, as a wife and children, in the life of another. "It is remarkable," says Mr. Cooley in his work on Torts (pages 26 and 27), "that the common law * * * should not have allowed the damages, suffered by others from an unlawful killing, to be recovered. The interest which husband and wife possess in each other's life, must usually have a pecuniary value which would be estimated for many purposes at a large sum in dealing with others. * * * Why should not the money value of his life, when it was taken away by unlawful act or negligence, be a right of action in the hands of his representatives?" There was a glaring absurdity in allowing a husband and father, if injured, but not killed, a right of action for the recovery of the damages thus sustained, and denying to his widow and children any compensation for the damages inflicted upon them, should the injury be greater and result in his death. The justice of their demands were recognized in England by act of Parliament (9 Vic., Chap. 93), and in Illinois, by act of the General Assembly, approved February 12, 1853, re-enacted in 1874,

and now constituting sections 1 and 2 of chapter 70 of our Revised Statutes. The first section of this act provides that if death ensues from the wrongful act, default or neglect of another under such circumstances as would have warranted a recovery of damages by the deceased had the injury not proved fatal, an action shall lie to recover the damages occasioned by the death of the injured party. That the damages thus to be recovered are as compensation to persons having a pecuniary interest in the life of the deceased, is manifest from the provisions of the second section of this act, which declares that the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in proportion, provided by law, in relation to the distribution of personal property left by a person dying intestate, and shall be such damages as shall be deemed a fair and just compensation, with reference to the pecuniary injuries resulting from the death of such person, to the wife and next of kin.

Section 2 requires that the action be brought in the name of the executor or administrator of the deceased, but the money received does not constitute assets of the estate for the payment of the claims of creditors, legacies or other charges upon the estate created by a will, or the costs of administration or executorship. The administrator or executor brings the suit and receives the money recovered thereby, not in right of the estate, but as a trustee for those having a pecuniary interest in the continuance of the life of the deceased. *City of Chicago v. Major*, 18 Ill. 356.

The recovery is limited to the financial or pecuniary loss of such persons by the death of the deceased. The expenses incurred or paid for medical attendance, care or nursing, or otherwise in the endeavoring to effect a cure, the agony and pain suffered and endured by him, the loss of earning while sick or disabled by the injury, can not be considered in estimating the amount of damages. The sole measure of damages is the pecuniary loss of the widow and next of kin

occasioned by the destruction of the life of the deceased person. C. & I. R. R. Co. v. Morris, 26 Ill. 400; C. & A. R. R. Co. v. Shannon, 43 Ill. 338; Conant v. Griffin, 48 Ill. 410.

The enactment of the statute under consideration established the doctrine that the wife and next of kin and each of them had a property right and financial interest in the life of the husband and relative. Prior to its enactment this property or financial interest was not recognized by the law, and no award of compensation for its loss was permitted. Thus a new right of action was created in favor of persons who before had neither right, cause of action or remedy.

If we are right thus far, the wife and children of Daniel Maney, by the operation and effect of the statute, had a financial property interest in the continuation of his life. It did not flow from, nor was it based upon, the desire or consent of Daniel Maney. As husband and father, the law charged him, while living, with the performance of certain duties in their behalf and for their benefit. The duties arose out of marital and parental relations, were created by law, out of consideration of public policy, existed wholly without regard to the will of the husband, and were legally enforceable in his lifetime against him and his property. It was a substantial, subsisting right in favor of his wife and children, available to them during the continuation of his life. Prior to this enactment it ceased at his death. By the enactment the right was kept alive, if his death be occasioned by the wrongful act, neglect or default of another, and a remedy provided for its enforcement against the party so causing his death. Neither argument nor authority would seem to be necessary to sustain the view that the widow and next of kin can not be deprived of the property right so created and vested in them at the will or pleasure or by the contract of another, though he be the party charged with the performance of duties out of which the right grew.

The statute created the right in favor of the wife and children. The amount to be recovered is the financial loss suffered by them, limited only by the express provision of the statute to \$5,000, which, when recovered, is to be dis-

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tributed to each of them in the proportion that such person would inherit any personal property that the husband and father owned. Each of the beneficial plaintiffs suffered a financial loss by the death of Maney, and became entitled by this enactment of the statute to an award of compensation for such loss. No power existed in him to select by contract or otherwise one of the persons so entitled and invest such one with a right to receive and be paid the full amount of the loss of all, to the exclusion of others likewise suffering financial loss by his death.

The value of the interest of his wife and children in his life, and the amount of their financial loss in case of his death, is limited by the statute, and it was wholly beyond his power to further limit their right of recovery by any contract he might enter into.

The payment relied upon was not made to the plaintiff, and hence is in no way available in defense of this action. It was, it is true, paid to Mary Maney; not, however, to her as administratrix, for the benefit, under the statute, of the widow and children of the deceased, but to her as an individual beneficiary under the provision of a certificate of membership of deceased in the "Relief Department" of the defendant company, and in discharge of the contract obligations of such relief department.

The equities existing between the defendant and Mary Maney, if any were created by the payment, can not be adjusted in this action. Nor is the right of action in any way affected by the failure or refusal of said Mary Maney to refund or offer to refund the money paid to her. In this action she is plaintiff in a representative capacity, charged with the distribution of any moneys that may be recovered to the beneficiary entitled thereto. Her act or omission to act in relation to transactions between the defendant in error and Mary Maney in her individual capacity, can in no wise affect the issues in this case.

Had the contract made by the deceased provided for the payment of the sum named to all the persons who under the statute had right of recovery in the event of his death, the

acceptance of such sum by such persons might have operated to bar further recovery upon familiar principles of estoppel.

But no such bar is created by a contract to pay one only of such persons, nor by the payment to one only. The action is for the benefit of all entitled to recover under the statute, and is not barred, or the right of recovery in any wise affected, by the payment to Mary Maney of the "death benefit" under the contract entered into by the deceased.

Whether Mary Maney ought in justice, receive, in addition to the "death benefit," her proportion of such sum as may be recovered, if any is recovered, in no wise concerns the other parties entitled under the statute. In the determination of that question she and the defendant are the only ones interested, and if occasion demands, no doubt an appropriate remedy will be found to bring it before the courts, and a just determination of that contention secured.

We think the demurrer to the pleas, and each of them, should have been sustained. Therefore, the judgment must be, and is, reversed, and the cause remanded for further proceedings not inconsistent with the views here expressed.

49	116
153	168

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1. *Payment*.—A payment is the discharge, in money, of a sum due, and it can only be made in money, or that which the creditor accepts as money, or in lieu of it.

2. *Authority to Receive Payment*.—The fact that notes made payable at a bank are placed there by the payee, and there found by the maker, without any notice that they were not left there for collection, is sufficient to show an authority to receive payment, and to justify the maker in paying.

3. *Authority of an Agent to Accept Anything but Money as a Payment*.—An agent having for collection a promissory note, or other money demand, can not rightfully accept anything but money as payment, without express authority from his principal.

4. *Payment--Note Left for Collection--Authority to Accept Another Note in Payment*.—If a maker takes up his note left in a bank for collection, by giving to the banker his note for the amount, he does so at his own risk of the banker's failure to pay the amount over to the payee of the

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note so taken up, unless the bank's action is really and *bona fide* a loan, the money being in hand subject to the proposed appropriation and actually transferred to the creditor's account, and the burden of proving these facts as between the creditor and the debtor is upon the latter.

5. *Payment by Delegation.*—The payee left a note in a bank for collection and the maker took it up by giving his note for the amount. The bank having failed the payee brought suit against the maker. *It was held*, that had there been an actual transfer of the money belonging to him in the bank, as would have been an acknowledgment by the bank that it had received the amount from the maker, then under the authority the bank had to receive payment in money, it would have been a payment by delegation.

Memorandum.—Action of replevin. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, ANTHONY THORNTON, ROBERT L. MCKINLAY AND J. F. VAN VOORHEES, ATTORNEYS.

"Possession, unattended by circumstances which, in a reasonable mind, ought to excite suspicion or distrust, or put the party on inquiry, is *prima facie* evidence of title to a promissory note." *McConnell v. Hudson*, 2 Gilman, 648; *Jewett & Root v. Cook*, 81 Ill. 263; *Curtiss v. Martin*, 20 Ill. 557.

"In ordinary cases, the mere production of a bill of exchange, note or check is, in general, sufficient to warrant the payment to the person who produces it." *Chitty on Bills*, 7 Am. Ed. 281. The delivery of a note, unindorsed, to an agent for collection, authorized the agent to receive payment. *Padfield v. Green*, 85 Ill. 530.

"A demand of payment, by an agent having any parol authority, or the mere possession of the paper, is sufficient." *Bank of Utica v. Smith*, 18 Johns. 239; see *Story on Agency*. Sec. 104; *Williams v. Walker*, 2 Sandf. Ch. 325; *Yazel v. Palmer*, 81 Ill. 85.

The taking up and cancellation of the notes, and the substitution of other negotiable paper, is equivalent to a pay-

ment. *Wilkinson v. Stewart*, 30 Ill. 58; *Critzer v. McConnell*, 15 Ill. 171. "Where the debtor's own negotiable note is given for a pre-existing debt, it is *prima facie* evidence of payment, but is still open to inquiry by the jury. The reason is that otherwise the debtor might be obliged to pay the debt twice." 2 Greenleaf's Ev., Sec. 520.

"The rule of law is, where one of two persons must suffer loss, he who, by his negligent conduct, made it possible for the loss to occur, must bear it." *Anderson v. Warne*, 71 Ill. 22; *Noble v. Nugent*, 89 Ill. 523.

APPELLEE'S BRIEF, TANNER & TANNER, F. W. DUNDAS AND
H. VAN SELLAR, ATTORNEYS.

"A bank at which notes are made payable, but with which they have not been deposited for collection, though they are in its manual possession, is not the agent of the holder to receive payment, and money deposited with it by the payor, to meet the notes when presented, does not constitute payment, but remains his own property." *Chenny v. Libby*, 10 S. Ct. 498, 134 U. S. 68.

The general rule is, "An agent is only authorized to receive payment in cash." See Am. and Eng. Encyclopedia of law, Vol. 18, p. 194; *Lochenmeyer v. Fogarty*, 112 Ill. p. 572; *Harback v. Colvin*, 73 Iowa, p. 638; *British, etc. v. Tibballs*, 63 Iowa, 468.

"Where an attorney or agent receives notes in payment of claims left in his hands for collection, the claims are not thereby paid. And if the attorney or agent proceeds to collect such notes, the money arising therefrom is at the risk of the debtor, so long as it remains in the attorney's or agent's hands." *Kenny v. Hazeltine*, 6 Hump. (Tenn.) 62.

OPINION OF THE COURT, PLEASANTS, J.

This was an action of replevin brought by appellee for two notes of appellant, of January 14, 1891, for \$6,650 each, with interest at six per cent, payable to the order of the plaintiff, at the bank of Standiford Brothers in Chrisman, one on or before March 1, 1892, and the other on or before

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March 1, 1893. Failing to obtain them under the writ a count in trover was added to the declaration. The cause was tried on the general issue, with a stipulation for the admission of all evidence that would be proper under any appropriate pleading, and a verdict found for plaintiff for \$13,863 damages. A *remittitur* of \$40 was entered, defendant's motion for a new trial overruled, and judgment rendered against him for the remainder. He here seeks a reversal of that judgment for the reasons assigned, that the finding was against the law and the evidence and that the court erred in the matter of instructions.

The facts deemed material are undisputed. Appellant was a cattle dealer, worth \$50,000. On the 14th day of January, 1891, he bought of appellee a 400 acre farm, giving therefor his check on the bank mentioned for \$6,700, and the notes in controversy. At his suggestion they were made payable as they were because appellee had intimated that having now sold his farm he thought of going to California, where his son resided, for a visit of indefinite length, and appellant said he might want to pay them before maturity, if he should sell his cattle, and in the absence of appellee, and on the same day were placed and left in the bank by appellee, without indorsement.

About the first of May following, he bought out a drug store at Chrisman, and abandoned the idea of a trip to California. But near the last of August, he did go to Kentucky on a visit, and did not return until the first of October, when he was surprised to learn that in the meantime appellant had obtained possession of the notes from Standiford Brothers, and they had absconded.

Appellant was the only accessible person who knew how he obtained them, which he stated as follows: "Standifords told me if I run short of money to come and they would try to supply me with what money I needed in my business. I went to the bank on the 4th day of September and asked them for \$3,300, and they said I could have it and I got it. I borrowed the money there and took those notes and gave my check for the interest and my notes for the principal. I

gave the notes to Standiford Bros., signed by myself. I paid in cash, I think, over \$500, altogether. I have the checks in my pocket. One check was for \$259.25 and the other for \$264.50. For the notes in controversy I gave them, I think, one note for \$5,000, one for \$1,650 and one for \$6,650. The notes that I paid off drew six per cent interest, and those other notes that I have drew five per cent interest from date.
* * * Alexander Standiford gave me the notes, which I now have."

It appeared, more particularly, that he got the first on September 8th, upon giving his check for the accrued interest and for the principal, his two notes of that date for \$1,650 and \$5,000, respectively, at six months, and the other on the 14th, giving his check for the accrued interest and for the principal, his note of the 12th (which was a Saturday), for \$6,650, at one year. These notes were payable to the order of Standiford Brothers, and when produced on the trial appeared to bear interest at *five per cent* "from due." He testified that when he gave them, no money was counted in his presence, and that he paid none nor gave any check except for the interest. It did not appear that he was credited with anything on account of those notes upon the books of the bank, upon any pass book, nor was there any evidence tending to show how much money was then in the bank; but the notes to appellee, then surrendered, were stamped by Standiford Bros. as "paid" and the amount credited on their books to appellee. They sold and assigned each of the new notes to Bibb & Co., bankers at Paris, within twenty-four hours after they received it, and on the 26th of September disappeared. They had been doing a banking business at Chrisman for about twelve years. Latterly, their character and standing had been discussed and questioned, and there was talk of starting a new bank there. Appellant testified: "I couldn't tell anything about whether the Standifords were weak financially. I had heard it talked about for over a year, but it seemed like nobody believed it;" and that appellee had expressed to him his confidence in them, and did his business there.

Soon after appellee learned that appellant had the notes in controversy he demanded them of him, and being refused, brought this suit.

It is clear that unless the transaction which took place between appellant and the Standiford Brothers, as stated, amounted to a valid payment of the notes in controversy as against appellee, he was entitled to recover. Until appellant got them in that transaction, the right of property and of immediate possession, were confessedly in the appellee; and though their subsequent actual possession by the maker after they had become payable, without further proof, would raise the presumption of payment, yet when the evidence disclosed the means by which he obtained them, his claim of right must rest upon the legal sufficiency of those means to establish it, and not at all upon any presumption from the mere fact of possession.

Upon the question of their sufficiency, appellee contends, first, that the bankers were not authorized to receive payment for him; that the notes were left with them for safe keeping merely, and that appellant so understood. He testified that he told appellant, when they were being drawn up according to the latter's suggestion and for the reason stated, that in case he should go to California, he would make an arrangement by which they could be paid in his absence if appellant wished to pay them, but that he made no such arrangement because he did not go to California. The scrivener who drew up the notes corroborated him as to this statement; and the fact that he did not indorse them is claimed to be strong evidence in support of his contention.

Appellant testified that when appellee left them at the bank he said to Standiford: "Let Mr. Scott pay these notes whenever he wants to, and put the money to my credit," and was corroborated as to that by two other witnesses, against the positive denial of appellee.

This contradiction is solely upon the question of express authority, which we deem immaterial, since we think authority no less sufficient, was proved by the facts that the notes were made payable at the bank, were placed there by

the payee, and there found by the maker at the time of the alleged payment, without due notice that they were not left for collection. *Wallace v. McConnell*, 13 Peters 150; *Ward v. Smith*, 7 Wallace (U. S.), 451. No further arrangement by appellee was required. The fact that the paper was then in the possession of the bankers was *prima facie* sufficient. *Stiger v. Bent*, 111 Ill. 338, and cases there cited; *Yazel v. Palmer*, 81 Id. 85; *Story on Agency*, Sec. 104. Without that, appellant could have done no more than, by depositing or tendering the amount due, exonerate himself from liability for costs of suit and interest for delay. *Wood & Co. v. Merchants S. L. & T. Co.*, 41 Ill. 267, and cases there cited on p. 270; *Yeaton v. Berney*, 62 Ill. 61, and the Federal cases *supra*. Where a note is surrendered to the maker its indorsement by the payee is unnecessary. *Padfield v. Green*, 85 Ill. 530.

But the full extent of the authority of *Standiford Bros.* in the premises, was to receive payment of the notes, and only in that case to surrender them to appellant. The question then is, did they receive it.

Bouvier defines payment as "the discharge in money of a sum due," and we understand it to be elementary law, that it can be made only in money, or that which the creditor accepts as money or in lieu of it.

Whether anything else received is so accepted, is a question of fact, depending on the intention, and provable directly or circumstantially, like other such facts, or legally presumed by the court. 2 *Greenl. on Ev.*, sections 116 and 119. This case is not embarrassed by any such question. It is not claimed that appellee received anything in payment, unless by his agent, and in the manner already stated.

An agent for collection of a promissory note or other money demand can not rightfully accept anything but money, as payment, without express authority from his principal. *Story on Agency*, sections 98 and 99; *Padfield v. Green*, 85 Ill. 530; 2 *Parsons on Cont.*, (5th Ed.) 615-6 and notes *l, m, n, o*; 18 *Am. & Eng. Enc. of Law*, 194 and notes; *Lochenmeyer v. Fogarty*, 112 Ill. 582. The authorities cited in the

brief for appellant, *Ralston v. Wood*, 15 Ill. 159, *Wilkinson v. Stewart*, 30 Id. 58, *Witherby v. Mann*, 11 Johns. 518, and 2 Greenl. on Ev., Sec. 520, are cases of acceptance by the creditor himself of something other than money; and we know of none in conflict with those above cited, upon the extent or limit of an agent's authority. In this case it is not claimed that Standiford Bros. had special authority to receive anything but money as payment.

What did they receive? The only evidence in the record bearing upon this question is the statement of appellant, and is therefore not to be strengthened in his favor by construction. He says: "I gave my check for the interest and my note for the principal." Again: "I paid in cash, I think, over \$500, altogether." He produced the checks he gave, amounting together to \$523.75, and said: "At that time I paid no money into the bank except those two checks exhibited here. They were all the checks that I gave." Again: "For the notes in controversy I gave them, I think, one note for \$5,000; one for \$1,650, and one for \$6,650," the sum of which is the exact amount of the principal of those he took up. And still again: "The notes that I gave Standifords for the notes of Mr. Gilkey, are still outstanding against me."

In *Lochenmeyer v. Fogarty*, *supra*, the Supreme Court held and declared it to be settled law that "an attorney, in the absence of special authority, has no right to give up his client's notes for paper payable to himself, nor any "authority to receive anything but money in payment of his client's debts," citing *Nolan v. Jackson*, 16 Ill. 273, and 2 Parsons on Notes and Bills, 614, note c. There, as here, the agent had assigned the notes he so received, and they had been paid by the maker. We know of no recognized distinction in respect to this power between attorneys-at-law and bankers or other agents for collection of money demands.

That case, then, would seem to be decisive of this, unless one of the theories of the defense here, that the notes to Standiford Bros. were given for the money which was borrowed from them and immediately paid back, or credited

to appellee by them, for those in controversy, can be maintained upon the evidence in the record. If it can, we are unable to see why it was not applied to protect the debtor against double payment in the Lochenmeyer case cited, and would not practically abrogate the rule there announced. The question would arise only when the agent failed to pay over to his principal, and it may be presumed to be of frequent occurrence that banks holding paper for collection surrender it to the debtor on receipt of his note or other satisfactory security for the amount, as upon payment in money then loaned him for that purpose on such security, where no money is produced, but the principal's account is properly credited on their books. We apprehend, however, that this is at the debtor's risk of the bank's failure to pay, unless the transaction is really and *bona fide* a loan, the money being in hand, subject to the proposed appropriation and actually transferred to the creditor's account, or the arrangement is made with his consent, expressly given or clearly implied by the course of his dealing with the bank or by its general course known to him; and the burden of proving these facts, upon the question of payment, as between the creditor and the debtor, would rest upon the latter. Failing to prove them, he would be held to have taken the risk of the bank's failure to pay, and left to his recourse upon its agreement. In *Wood & Co. v. Merchants Savings etc. Co.*, 41 Ill. 271, the Supreme Court, adopting the words of Justice Marcy in *Olcott v. Rathbone*, 5 Wend. 494, say: "We think the better rule is to consider nothing as an actual payment which is not really such, unless there be an express agreement that something short of a payment shall be taken in lieu of it."

The language of appellant above quoted plainly imports that he did not pay money for the notes in controversy, except as to the accrued interest thereon, and that he did give his notes payable to Standiford Bros. for them. Neither of itself, nor in the light of antecedent or attendant circumstances, does it seem to admit of construction. He testified to no word said or act done by either of the parties to the

transaction indicating that he gave them for borrowed money. The mere act of giving them and at the same time receiving those he had given to appellee for the same principal amount would be more consistent with a mutual understanding that they were given directly for the latter (whether called exchange, substitution, commutation or payment) than for borrowed money applied in payment of them. Some explanatory circumstance; something said or done besides, is necessary, to suggest the idea of a loan. But nothing here appears, more than would have been expected if the notes had been confessedly received as payment. It is true that on his cross-examination appellant said: "I paid the notes in controversy by borrowing money of Standiford Bros. and paid them, and had the money placed to Gilkey's credit." This, however, adds nothing to the facts he had previously stated, except that he had the credit to Gilkey entered upon the books of the bank. The rest is his conclusion that these facts constituted payment in money. In all of his lengthy examination in chief, detailing the particulars and circumstances of this transaction, he had spoken of but one loan of money from Standiford Bros., which was of \$3,300, made four days before he took up the first of the Gilkey notes, and presumably for use in his business as a cattle dealer, as it was in respect to his need for that purpose that they had promised to accommodate him. That sum was doubtless credited to him on their books, for he was allowed to check against it. We may presume his checks for the interest on the Gilkey notes were charged against it. Had he supposed that he was actually borrowing the two larger sums of \$6,650 each, for which he so soon afterward gave his notes, he could hardly have failed, while speaking of such transactions, to mention these as among them.

That was the question. There was no doubt that he had given his notes to Standiford, and we think it was for him to show that he gave them for borrowed money and that with it he paid them the principal of the Gilkey notes. As we have seen, however, he did not then intimate that any such idea was in his mind. On the contrary, he three times

distinctly stated that he gave them "for the notes in controversy," and once besides that he paid no money except for the accrued interest. He may have supposed this amounted to payment in money. And so it may, as between him and them. A promissory note is sufficient *prima facie* evidence of a loan between the original parties. 2 Greenl. on Ev., Sec. 112 and notes. But a loan, in both the legal and popular sense, is a bailment, including delivery of the subject where it is susceptible of it, to be returned *in specie* or (as in the case of money) in kind. Here appellant never for an instant had possession or control of an actual dollar of this amount; but only the agreement of Standiford Bros. to place it to Gilkey's credit, and the actual entry of such credit on their books. Had there been an actual transfer of money belonging to him into their hands, and such an entry made as would have been an acknowledgment by them that they had received the amount from him, then under the authority they had from appellee to receive payment in money, this might have been a "payment by delegation," and binding upon appellee. 2 Parsons on Cont., 625 and note U.

Here it does not appear that appellant had money to anything like the amount of these notes in their hands, or any such credit on their books, or that any transfer of such money or credit was made to appellee or any such acknowledgment by Standiford Brothers. Their books were in the hands of a receiver. Appellant introduced them in evidence, and Mr. Thomas, who had been their book-keeper, as a witness. They showed the receipt on September 8, 1891, of appellant's notes for \$5,000, and \$1,650 at six months, but no credit to him as for money, and the charge to him of the check for \$259.25; and appellee's account, in the ledger, showed a credit to him of that date of \$6,909.25. They also showed the receipt on September 14, 1891, of appellant's note of the 12th, for \$6,650, at one year, but no credit for money, and also the charge to him of his check of the 12th for \$264.50; and in appellee's account, on the ledger, a credit to him, on the 14th, of \$6,914.50. But the journal, containing the original entry, from which this item of credit was so transferred to

the ledger, showed it as follows: "September 14th, Monday. "W. T. Gilkey, by Josephus Scott, note and interest, \$6,914.50." The record does not show the journal statement of the credit of September 8th, but we may well presume it was like this, a credit by appellant's note and interest.

These entries were in accordance with the facts as stated by appellant, and prove that Standiford Brothers, like him, understood they were receiving as payment of the principal of the Gilkey notes, not money, but his notes, payable, not to him, but to their order; and that they did not credit Gilkey nor charge themselves with money, as having been received therefor, but with Scott's note for its amount. Their acceptance of these notes as payment, without special authority from appellee, would not bind him. Nor would their assignment of them before maturity and for value without his knowledge or consent, to an innocent holder. He did not give such authority, nor consent to, or know of such assignment. Nor did he ever consent to accept Standiford Brothers as his debtors in place of appellant, without proper payment first made by him to them. That he trusted them as collectors and depositaries is immaterial. He did nothing to mislead or deceive appellant as to the extent of their authority, nor put it in their power to perpetrate the fraud by which one or the other must suffer. It was appellant's duty to ascertain that appellee authorized the receipt of these notes in payment. Failing to do so, he gave them at his own risk of their making payment to his creditor, and can not be held innocent. *Cooley v. Willard*, 34 Ill. 74. There was nothing here to warrant his presumption of such authority, as was the case in *Noble v. Nugent*, 89 Ill. 523.

The facts, proved beyond question, in our opinion inevitably established appellant's liability in this action. He obtained possession of the notes in controversy wrongfully, as to appellee, or at least his refusal to surrender them on appellee's demand, was a conversion of them. The finding to that effect was not only well supported, but required by the evidence, irrespective of any question of good faith on the part of appellant, which we therefore refrain from considering.

For the same reason there is little need to notice the action of the court in reference to instructions. The principal errors are incidentally indicated in what has been said. The hypothesis of the argument stated in the second given for plaintiff was not warranted by the evidence, as to the checks; and the fourth should have been qualified by the inclusion of due notice to the maker that the notes are not left for collection. The third, seventh, twelfth and thirteenth of the defendants refused, should have been given; but the conclusion of the fifteenth was too broad, and the others were either materially wrong or of such a character that their refusal could not have prejudiced his case. Some of those given were more liberal than the law or evidence warranted. We have attempted to show that there was really no evidence that he in good faith borrowed or supposed he borrowed any money on his notes to Standiford Bros. of September 8th and 12th, and are of opinion that under any proper instructions the verdict should have been for the defendant.

But we believe from the evidence that there was a valid payment of the interest on those in controversy, to the time they were taken up. Authority to receive the whole includes authority to receive a part. There is nothing to rebut the inference that appellant had funds in the bank sufficient to meet the checks shown. They were expressed to be for interest on these notes, and effectively appropriated the amount mentioned in them, to the payment of it. They were charged to him and credited to appellee on the books of the bank. This was payment, to that extent, by delegation. The jury seem to have ignored it, misled, perhaps, by the error in the second instruction for plaintiff above noticed, and appellee must look to his agents for it. The *remittitur* of \$40, falls considerably short of obviating the error in the amount awarded by the judgment, which must therefore be reversed, at the cost of the plaintiff below, and the cause remanded to the Circuit Court with directions, upon a *remittitur* being made by the plaintiff of \$523.75, to enter judgment in his favor on the verdict for the residue, viz., \$3,299.25 and costs. In case of a failure to make such

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remittitur within thirty days after the reinstatement of this cause in the court below, that court is directed to award the defendant a new trial.

Reversed and remanded with directions.

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1. *Railroad Companies—Duty to Maintain Sidewalks, etc.*—The duty of a railroad company to maintain a sidewalk, etc., is predicated upon Par. 71, Ch. 114, S. & C. Stat. 1937, providing that at all railroad crossings of highways and streets, railroad corporations shall construct and maintain crossings, and the approaches thereto within their respective rights of way, so that at all times they shall be safe to persons and property, and is limited to the crossing, and the approach thereto within the right of way. There is no obligation imposed upon it to build and maintain a sidewalk beyond the approach to the crossing. The qualifying words, "with in their right of way," do not require it to do more than make the crossing, and the approach, but if, by reason of the situation, the approach necessarily extends to the limit of the right of way, it must, to that extent, be built by the company.

2. *Railroad Companies.—Liability for Accidents, etc., Confined to Right of Way.—Pleading.*—In a declaration against a railroad for damages, sustained by a city, by reason of a judgment having been recovered against it, for injuries resulting from a defective sidewalk, it was charged that the defect in the sidewalk was within the right of way of the company. In an additional count, the declaration in the suit of the person who recovered the judgment against the city, was set out *in haec verba*, in which was designated the point where he was injured, in the same way, and it was then averred by the city that said walk, upon which said person so received his said injuries, was a crossing, constructed by the company for the use of foot passengers walking on the street, to cross its right of way, and was the crossing and approach thereto, of said street in said city, and over said railroad, and that it was then and there the duty of the defendant railroad company to construct and maintain said crossing. *It was held* that the declaration did not show a failure by the company to maintain the crossing, and the approach thereto, but merely to maintain a good sidewalk within the right of way, and construing the plea most strongly against the pleader, the point where the injury occurred was not on the crossing or the approach thereto. It failed to show a neglect of duty on the part of the company, and a demurrer was properly sustained thereto.

Memorandum.—Action of trespass on the case. Appeal from a judgment for plaintiff, rendered by the Circuit Court of McLean County; the

Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed June 5, 1893.

APPELLANT'S BRIEF, JACOB P. LINDLEY, ATTORNEY, J. H. ROWELL AND SAIN WELTY, OF COUNSEL.

"The requirements embodied in section 8, requiring railroad companies to construct and maintain the highway and street crossings, and the approaches thereto, within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way, should be constructed by the railroad company, and maintained by it, because of the danger attending the operation of its road. Section 8 recites that the railroad company shall 'construct and maintain' the crossings, so that at all times they shall be safe, as to persons and property. Safety of persons and property is the object of the requirement." *Chicago & N. W. Ry. Co. v. City of Chicago*, 29 N. E. Rep. 1109.

In this State, as between it and the public, it is the duty of the city to maintain the sidewalks in a safe condition, and for neglect to use reasonable diligence in this behalf, it must respond in damages to a party injured, and this is the law for the whole street, whether at a railway crossing, or at any other point. *City of Joliet v. Verley*, 35 Ill. 58; *City of Champaign v. McInnis*, 26 Ill. App. 338; *Village of Mansfield v. Moore*, 124 Ill. 133; *City of Chicago v. Gallagher, Admr.*, 44 Ill. 295.

A judgment having been recovered against the city, it can not demand to be reimbursed by the railroad company.

In *Gridley v. City of Bloomington*, 68 Ill. 47, the court say: "Although the city is primarily liable for the damages sustained, we have no doubt of right to recover back the amount from the person whose duty it was to keep the premises in repair."

In *Severin et al. v. Eddy*, 52 Ill. 189, the syllabus makes a *resume* of the decision, as follows: "If an individual construct a hatchway in a sidewalk, he must respond for any

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damages resulting from his neglect to render it safe, and free from danger. It is also the duty of the city to keep the street and sidewalk in a safe condition, and it will be liable for injury occasioned by its neglect of duty in that respect. But should a recovery be had against the city in such case, the person whose neglect of duty caused the injury, will be liable over to the city therefor." See *City of Bloomington v. Roush*, 13 Brad. 339.

If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalk or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk was rendered unsafe, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance. *Dillon on Municipal Corporation*, Vol. 2, Sec. 1035.

APPELLEE'S BRIEF, WILLIAMS & CAPEN, ATTORNEYS.

A city is primarily liable for damages to persons by reason of negligence in keeping the streets and sidewalks upon such streets in reasonable repair.

The fee of the streets being in the city, the burden is placed by law upon the city to keep them and the sidewalks upon them in proper repair. *Chicago v. Keefe*, 114 Ill. 222; *Bloomington v. Bay*, 42 Ill. 503; *Mansfield v. Moore*, 124 Ill. 133; *Joliet v. Verley*, 35 Ill. 58; *Flora v. Naney*, 136 Ill. 45; *Id. v. Id.* 31 Ill. App. 493; *C., B. & Q. R. R. Co. v. Quincy*, 28 N. E. Rep. 830; *Champaign v. McInnis*, 26 Ill. App. 338; *Carterville v. Cook*, 29 Ill. App. 495.

The city can not neglect its duty until some one sustains personal injuries by reason thereof and then compel the property owner to pay the amount recovered for such injuries. *Gridley v. Bloomington*, 88 Ill. 554; *Rochester v. Campbell*, 123 N. Y. 405; *Raymond v. Sheboygan*, 76 Wis. 335; *Fuller v. Jackson*, 46 N. W. Rep. 721; *Wickwire v. Town of Angola (Ind.)*, 30 N. E. Rep. 917; *St. Louis v. Conn. Mut. Life Ins. Co. (Mo.)*, 17 S. W. Rep. 637; *Heeney v. Sprague*, 11 R. I. 456; 2 *Shearm. & Redf. on Neg.*, Sec. 343.

A judgment against one wrong-doer can not fix the liability of a second wrong-doer, in the absence of sufficient notice to appear and defend in the name of the party against whom the original judgment is sought. *Port Jervis v. First National Bank*, 96 N. Y. 550.

Even where two joint tort feasons are *in pari delicto*, one can not compel contribution from the other. *Rend v. Chicago West Division Ry. Co.*, 8 Brad. 517; *Cooley on Torts*, 149.

OPINION OF THE COURT, WALL, J.

The appellant city brought its action on the case against the appellee railroad company, alleging that it had been compelled to pay certain damages recovered against it by one Tustison, who had sustained a personal injury by reason of the defective condition of the sidewalk, on a street in said city, at a point where the said street crossed the right of way of said railroad company; that it was the duty of said railroad company to keep said sidewalk in good repair, and that in the action brought by said Tustison against the city the railroad company was originally a party, co-defendant with the city, but that on the trial of that cause the plaintiff therein dismissed the said railroad company therefrom, whereupon the city notified the company to appear and defend the action, and that it would be held by the city responsible for any judgment that might be recovered therein, but the company declined to appear or defend the cause further, and although the city continued its defense, the plaintiff recovered, and in the present action the city sought to recover over from the railroad company.

The Circuit Court sustained a demurrer to the declaration, and the question now is whether a good cause of action was disclosed.

The duty of the railroad company to maintain the sidewalk referred to, is predicated upon the following enactment, Par. 71, Ch. 114, S. & C. Stat. p. 1937:

"Hereafter at all railroad crossings of highways and streets in this State, the several railroad corporations in

this State shall construct and maintain said crossings, and the approaches thereto within their respective rights of way, so that at all times they shall be safe to persons and property."

It will be observed that the duty of the railroad company here prescribed, is limited to the crossings and approach thereto within the right of way. There is no obligation to build and maintain a sidewalk beyond the approach to the crossing. The qualifying words, "within their right of way," do not require the company to do more than make the crossing and the approach, but if by reason of the situation, the approach extends to the limit of the right of way, it must, to that extent, be built by the company.

The term "approach," means a structure of some sort necessary to reach the railroad track from the common surface. It does not signify an ordinary sidewalk. It may be an embankment, or a bridge, or whatever is required for the purpose, at the particular place.

In the first, second and third counts of the declaration, it is charged that the defect in the sidewalk was within the right of way of the railroad company and west of its tracks. In an additional count, the declaration filed by Tustison against the city was set out *in haec verba*, in which he designated the point where he was injured in precisely the same way, viz., on the right of way, west of the tracks; and it was then averred by the city "that said walk upon which Tustison so received his said injuries, was a crossing constructed by the said Illinois Central Railroad Company for the use of foot passengers walking on Jefferson street to cross its right of way, and was the crossing and approach thereto of said Jefferson street, in said city, over said railroad, and it was then and there the duty of said defendant railroad company to construct and maintain said crossing, which was within its said right of way, so that at all times it would be safe to persons using the said crossing. And the said crossing is the sidewalk in said declaration complained of."

The first, second and third counts did not show a failure

by the railroad company to maintain the railroad crossing and the approach thereto, but merely to maintain a good sidewalk within the right of way; and construing the averment most strongly against the pleader, the point where the injury occurred was not on the crossing or the approach thereto. So, also, was the averment in Tustison's declaration set out in the additional count—but in this count an effort was made to aid the statement of the place where the injury occurred by a further averment.

Conceding for the present that this is admissible, yet we think the additional averment does not really help the plaintiff, for it appears that the walk which is called a crossing, was for the use of foot passengers walking on Jefferson street to cross the right of way, and by the rule of construction above stated, it does not appear that the defect was at a point where the railroad company was bound to provide a crossing over the track or the approach thereto. It is not enough to aver that the walk was for the purpose of crossing the right of way.

While the company must provide a crossing over its railroad track, it is not required to provide a crossing over the right of way in the shape of a sidewalk, or otherwise, unless it is necessary to do so in order to make a suitable approach to the crossing over the track.

The statute has been upheld by the Supreme Court as a valid exercise of the police power. *C. & N. W. Ry. Co. v. The City of Chicago*, 140 Ill. 309.

It applies by its terms as well to the case of a railroad built across a street, the street being first located, as to the case of a street opened across a railroad, the railroad being first located.

In the former case, as was held in *The People, etc. v. C. & A. R. R. Co.*, 67 Ill. 118, the company would be bound at the common law to furnish the public a suitable crossing, but in the latter case there would be no such duty were it not for the statute.

By the provision of a section subsequent to that above quoted, the company may be required to reimburse the city for making necessary repairs, etc., after notice given, and

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also be fined in the sum of \$100 for neglect to comply with the requirement of the first section.

Here, then, is a statute enacted under the police power of the State, prescribing a new duty and fixing a penalty for non-performance.

The rule that a penal statute or one in derogation of common right must be strictly construed, as now applied, means that courts will not extend the punishment to cases not clearly within the statute, yet the evident intention of the legislature will not be defeated by a forced and over strict construction. Sedgewick on Stat. & Const'l Law, 282. The duty imposed by this provision should not be extended beyond the plain meaning of the language employed.

Had it been designed to compel the railroad company to construct an ordinary sidewalk across its right of way at a point where it had not disturbed the surface by making its road, and where an unusual structure called an "approach" was not required to reach the crossing of the road, very different terms would have been used.

We hold, therefore, that the declaration failed to show a neglect of duty on the part of the defendant, and for this reason the demurrer was properly sustained.

In this view of the case it is unnecessary to inquire whether the company would in any event be liable for the amount of damages recovered by the injured party from the city, or whether its full liability is measured by the remedy and penalty provided for in the statute, nor to discuss the conditions necessary in any case to enable the city to recover over from one whose unlawful act or negligence has caused an injury for which the city has been compelled to pay damages.

The judgment will be affirmed.

Hinman v. Andrews Opera Co., use of, etc.

1. *Garnishment*.—A garnishee may be, and indeed for his own safety is, bound to inquire into the validity of the proceedings against his creditor to the extent of seeing that the court had jurisdiction to render the judgment against his creditor.

2. *Service of Process—Corporation.*—To give a justice's court jurisdiction to render a judgment against a corporation in attachment proceedings service must have been had either by leaving a copy of the writ with some of its officers, agents or employees, in accordance with the provision of Sec. 21, Ch. 79, R. S., or by posting notices and mailing a copy of such notice, addressed to the defendant at its place of residence, in compliance with the requirement of Sec. 51, Ch. 11, R. S.; and where, in an attachment against the Andrews Opera Company, an officer in his return stated that he had "personally served the within writ, by reading to Frank Peckett and V. C. Hinman, garnishees, and by reading said writ to the within named defendant, G. W. Moody, C. W. Andrews," it was held that a judgment rendered upon such services was void for want of jurisdiction.

3. *Service of Process—Partnership.*—At the common law, where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court by service of process. Actions against partnerships are instituted against the several persons composing the firm, and not against the firm as an entirety, distinct from its members.

4. *Attachments Against Partnership.*—Sec. 3, Ch. 11, R. S. authorizing attachment proceedings against a partnership by its firm name, is not intended to abolish the common law rule relating to the service of process in suits against partnerships.

5. *Attachments Against Partnership.*—Attachment proceedings will not be sustained against a partnership as an entity, unless the grounds for attachment exist against all the partners, and this rule is said to be universal, whether in a jurisdiction where, by special statute, judgments against a partnership may be rendered, though not all the partners are served with process, or where the common law rule that the judgment is against the members of the partnership prevails.

6. *Attachment Against Partnership—Affidavit—The Rule under the Statute.*—Under our statute an attachment against a partnership by the firm name as an entity, can only be sustained when the affidavit discloses grounds of attachment against each of the partners, and all must be brought within the jurisdiction of the court.

Memorandum.—Writ of attachment. Appeal from a judgment for the plaintiff, rendered by the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

APPELLANT'S STATEMENT OF THE CASE.

This is a suit in attachment brought by W. S. Cunningham against Andrews Opera Company before a justice of the peace. Judgment was rendered by the justice against the opera company *in personam*, upon the theory that the writ

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was served upon said opera company. Garnishee summons was issued against defendant, Hinman, and judgment rendered against him by default, from which judgment Hinman appeals to this court.

APPELLANT'S BRIEF, WILEY & NEAL, ATTORNEYS.

Before judgment could be rendered against garnishee, there must have been valid judgment either *in personam* or *in rem* against the Andrews Opera Company. Sections 54 and 55, Ch. 11, R. S. Ill.; Sec. 10, Ch. 62, R. S. Ill.

To render a valid judgment the justice must have had jurisdiction of the subject-matter and of the person of the defendant. Nothing will be presumed in favor of the jurisdiction of an inferior court. *Shufeldt et al. v. Buckley*, 45 Ill. 223.

Jurisdiction must affirmatively appear. Presumptively the Andrews Opera Company is a corporation. *The United States Express Co. v. Bedbury*, 34 Ill. 459; *Clarkson et al. v. E. & N. S. Despatch*, 6 Brad. 284.

A garnishee may inquire into the legality and regularity of the previous proceedings against the judgment debtor and that it is the duty of the court whenever it appears that the writ of garnishment was improvidently issued to dismiss the proceedings. *Pierce v. Carleton*, 12 Ill. 358; *Chanute v. Martin*, 25 Ill. 63; *Pierce, use, etc., v. Wade*, 19 Brad. 185; *Empire Car Roofing Company v. Macey*, 115 Ill. 390.

The validity of a judgment may be questioned in a collateral proceeding, and if it appears that there was no jurisdiction, or if the judgment be in an inferior court and the record does not show affirmatively jurisdiction of the person, such judgment is void. *Hayward v. Collins*, 60 Ill. 328; *Goudy v. Hall*, 30 Ill. 109; *Miller v. Handy*, 40 Ill. 448; *Campbell v. McCahan*, 41 Ill. 45; *Clark v. Thompson*, 47 Ill. 26; *Thatcher v. Powell*, 6 Wheaton (U. S.) 119.

APPELLEE'S BRIEF, A. J. FRYER AND JOHN M. HAYES,
ATTORNEYS.

There is no presumption, as contended by appellants, that an artificial being called a corporation is a corporation.

If an association of persons should act and do business—make contracts under a name which imports a corporation, they would be estopped from denying it, but this would not make it a corporation, nor raise any presumption that it was. *U. S. Ex. Co. v. Bedbury*, 34 Ill. 459.

OPINION OF THE COURT, BOGGS, J.

William S. Cunningham procured a writ of attachment to be issued by a justice of the peace of Coles County against the Andrews Opera Company. The affidavit alleged that the Andrews Opera Company was indebted to Cunningham in the sum of \$50, and that said "Andrews Opera Company is not a resident of this State, but that they reside in Mankato, Minnesota."

The return of service of the attachment writ is as follows: "Personally served the within writ by reading to Frank Peckett, U. G. Hinman, garnishees, and by reading said writ to the within named defendant, G. W. Moody, C. W. Andrews."

In the transcript of the proceedings before the justice of the peace, the finding as to the service is: "It appears that the Andrews Opera Company was served by attachment on the 1st day of December on G. W. Moody, Treas., and C. W. Andrews, a partner."

Judgment by default was rendered by the justice of the peace against the Andrews Opera Company, and against the garnishees a conditional judgment was rendered, which, upon a final hearing, was made absolute as to the appellant, Hinman, who prosecuted an appeal to the Circuit Court of Coles County, and being there defeated, brings the case by appeal to this court.

Two questions are here presented:

First, can Hinman, as garnishee, inquire into the validity of the judgment against the opera company?

Second, is the judgment rendered by the justice of the peace against the opera company, void for lack of jurisdiction over the person of the defendant?

The first question may be readily answered in the affirmative.

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A garnishee may be, and indeed, for his own safety is, bound to inquire into the validity of the proceedings against his creditor, to the extent of seeing that the court had jurisdiction to render the judgment. *Pierce v. Carleton*, 12 Ill. 358; 8 Amer. & Eng. Ency. of Law, p. 1218.

Our answer to the second question is that we think the judgment void.

If the Andrews Opera Company be regarded as a corporation, jurisdiction to render the judgment must have been obtained either by leaving a copy of the writ with some one of its officers, agents or employes, in accordance with the provision of Sec. 21, Chap. 79, R. S., or by posting notices and mailing a copy of such notice addressed to the defendant at its place of residence, in compliance with the requirements of Sec. 51, Chap. 11, R. S.

Service was not obtained by either of these modes. The action of the officer in reading the writ to the persons named in the return did not confer jurisdiction upon the justice to proceed against the corporation. *Grand Tower Mining Co. v. Schirmer*, 64 Ill. 106.

The name of the defendant would indicate that it is a corporation, and if that be so, the judgment is void, for the reasons given.

It is suggested that the Andrews Opera Company is a partnership, and that C. W. Andrews, a member of the firm, was duly served with the writ. This suggestion, it is thought, is aided by the transcript of the proceedings before the justice, in which appears the finding that the defendant opera company had been served "by attachment" on G. W. Moody, treasurer, and C. W. Andrews, a partner. If we accord to this finding of the justice all that is claimed for it, and it be conceded that the opera company is a partnership, still we think the justice of the peace was wholly lacking in jurisdiction to render a judgment against the firm, and none other was rendered.

At the common law, where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court, by service of process. Such actions are insti-

tuted against the several persons composing the firm, not against the firm as an entity, distinct from its members. Black on Judgments, Vol. 1, Sec. 237; Bates on Law of Partnership, Vol. 2, Sec. 1059.

In some of the States of the Union, by force of special enactment, suits may be brought against partnerships by their firm name as an entity, and in many such States special enactments authorize the rendition of a judgment against a firm, though all the partners are not served. Such judgments bind only firm property, and are unknown in jurisdictions where there are not such special enactments. We have no such statute in Illinois, the rule here being as at the common law. The third section of chapter 11 of our Revised Statutes, authorizes attachment proceedings to be instituted against a defendant co-partnership by the firm name, but this is not intended to have the effect to abolish the common-law rule, as will be readily seen when the provision of section seven of the same chapter is considered.

The section last named provides that in all cases where two or more persons are jointly indebted as partners, or otherwise, and an affidavit shall be filed, as provided in the first section of the act, so as to bring one or more of such partners within its provisions and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are brought within the provisions of the act and made amenable to the process of attachment, and as to the other partners or joint debtors, the requirement is that the writ shall direct the officer to summon all joint debtors or partners named in the affidavit, whether the attachment is against them or not, to answer to the action. When these two sections of the attachment act are considered together, it is seen that though a partnership may be proceeded against in attachment by the firm designation, the affidavit must name the several persons composing the firm, all of whom are to be brought into court as at the common law. Service upon but one partner would not therefore be sufficient to authorize the rendition of a judgment against the firm in attachment.

Attachment proceedings will not be sustained against a

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partnership as an entity, unless grounds for attachment exist against all the partners. This is said to be universal, whether in a jurisdiction, where, by special statute, judgments against a firm as an entity may be rendered, though not all the partners are served, or where the common law rule, that the judgment is against the members of the partnership, prevails. Bates' Law of Partnership, Vol. 2, Sec. 1117.

Under our statute an attachment against a partnership, by the firm name as an entity, can only be sustained when the affidavit discloses grounds of attachment against each of the partners, and all must be brought within the jurisdiction of the court. If grounds for attachment exist only against some of the members of the partnership, an attachment can not be sustained against the partnership.

In the case at bar, we are unable to discover, from the affidavit upon which the writ is based, or otherwise from the record of the proceedings before the justice of the peace, who the partners are, if the defendant be a firm, or that grounds for an attachment existed against either or any of the partners.

The judgment rendered by the justice of the peace against the opera company, whether such company be a corporation or a copartnership, is, we think, void for the lack of jurisdiction over the person of the defendant. The judgment against the appellant as garnishee must therefore be reversed, which is accordingly done and the cause remanded.

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1. *Discussion of Evidence.*—In discussing the evidence the court arrives at a conclusion different from the finding of the court below, and reverses the judgment.

Memorandum.—Action of assumpsit. Appeal from a judgment rendered by the Circuit Court of Coles County; the Hon. FRANCIS M.

WRIGHT, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

The opinion of the court states the case.

JAMES W. CRAIG, attorney for appellant.

F. K. DUNN, attorney for appellee.

OPINION OF THE COURT, PLEASANTS, J.

This was an action of assumpsit brought by appellee on the 23d day of February, 1892, upon an alleged agreement of appellant to convey to him a certain described tract of land in Coles County. Trial on the general issue, verdict for plaintiff \$425, new trial denied and judgment entered.

The land was occupied by Robert F. Stark, as tenant of appellant under a lease from March 1, 1889, to March 1, 1892, with an option to purchase, at its expiration, on terms therein stated. In the fall of 1891, appellee opened a correspondence with appellant for its purchase, which was conducted, on his part, mainly by Mr. Eli Wiley of Charleston. The obstacle in the way was the position and interest of the tenant. Appellant held two notes against him for rent, one past due, on which there was a balance of \$50 in judgment, and the other for \$300, due December 25, 1891, and the current year's crop was nearly ready to be hauled off. He was anxious to get his rent and be released from all obligation under the lease, and the tenant desired to make what he could out of his option. Appellee had tried to effect an arrangement with him which would be satisfactory to appellant, but had not succeeded. In this situation appellant, at Topeka, Kansas, on October 21, 1891, wrote to Wiley as follows:

"Yours of the 19th to hand. After considering the matter thoroughly, I think the best thing to do would be for you to have Newby and Stark come to your office, and with your help seek to try and effect a compromise of the trade between Newby and Stark, so as to have Newby take the

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crop and release Stark, and Newby include the notes in his trade with me. With this in view, I now make the following proposition, viz: That I receive for the farm and the two notes against Stark, free from your fees and all other expenses, except this year's taxes, the sum of \$4,550; \$1,500, down, and the balance in one, two and three years payments, at six per cent interest, secured by mortgage, in such size notes as may suit Mr. Newby, the first being no less than \$1,000.

If nothing can be done with Stark to effect this, I want you to begin at once, and by some radical process of law, seize and take possession of the crop without leniency. It is possible that you can effect some kind of a compromise with these parties by bringing them together again, and with my definite proposition to enlighten you as to what I am willing to sacrifice, you will have a basis to work on."

This is a proposition set forth in the single count of the declaration, and a complete copy of the letter is filed with it as a copy of the instrument sued on. Manifestly it was intended to aid in bringing about a compromise between appellee and Stark, which should be satisfactory to appellant as well, and upon the condition of its accomplishment. The declaration does not aver specifically that any arrangement was or would or could be made with Stark, but does aver that the plaintiff accepted said proposition, and that in consideration that he had promised to pay and secure the \$4,550 in the manner therein provided, and to do and perform all things on his part, in that behalf to be done and performed, the defendant promised to convey the real estate and deliver the notes to him within a reasonable time; and that although he was able, ready and willing to pay to the defendant, the said sum of \$1,500, and to execute notes secured by mortgage as therein required for the residue, "and to do and perform all things on the part of the plaintiff in that behalf to be done and performed, whereof the defendant then and there had notice, and was then and there, to wit, on the day and year last aforesaid, requested by the plaintiff to convey the said real estate and deliver the said promissory notes to

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him, the said plaintiff, the said plaintiff then and there offering to pay him, the said defendant, the said sum of \$1,500, down, and to execute notes secured by mortgage as in said proposition mentioned for the residue of said sum of \$4,550 upon receiving such conveyance and said promissory notes. yet the said defendant, not regarding his said promise and undertaking, did not nor would," etc. (breach and damage alleged in the usual form).

We do not think the declaration states a good case, or that the averment of defendant's promise is sustained by the letter relied on. Those preceding it, which were introduced by plaintiff, showed a proposition to sell the land only, and subject to Stark's rights, for \$4,350. The one in question includes the notes also, and contemplates a warranty deed. Stark's rights were to be extinguished, by arrangement between Newby and him. That was a condition precedent to Newby's right to such a deed and the notes. It is not true that appellant's promise was in consideration that appellee had "undertaken and promised," among other things, to obtain a release or extinguishment of Stark's interest; that was to be actually done. It was not of a nature to admit of a tender or offer of performance, as equivalent. It required an act of Stark, which appellee could not tender, nor offer to perform. If he had procured it to be done, that was actual performance, which appellant could not prevent or defeat. The declaration does not aver that it was done. Until it was, and the evidence thereof produced and offered to be shown to him, appellant was not bound to execute a good and sufficient deed of the land and deliver the notes. The offer or tender of the \$1,500, and the security mentioned for the residue refused, would not put him in default; and since the declaration did not aver that anything else was done by plaintiff or waived by defendant to put him in default, it did not show a cause of action.

Appellant, however, treated it as sufficient, by pleading to it, and it is claimed by appellee that he did, in fact, procure an assignment of Stark's rights, and accept the proposi-

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tion, and offered to comply with its other terms, and that appellant refused to execute the deed and deliver the notes.

The evidence is all in writing. There can be no dispute about what it is, nor is there in it any conflict. The only question, therefore, is, what does it prove?

We refer to so much of it as seems material. The proposition relied on was made October 11, 1891. On the 29th, Wiley, to whom it was addressed, answered as follows: "Since writing you, I have seen both Stark and Newby. They have had further conference, but can not trade. * * * Stark still thinks he has some advantage, which he has bargained to Newby on conditions. If Newby does not trade with you by the 15th November, then their trade about the contract is up. If you and Newby trade, he is to pay you the \$50 back rent."

On November 3d appellant wrote to Wiley: "Your letter of the 29th inst. came duly to hand. * * * I think, under the circumstances, that I shall not close the trade with Newby or in fact any one, until I get rid of Stark. You may therefore begin civil suit for the balance of last year's rent, and if you have any legal excuse to restrain the sale of the crop, except for the payment of rent, do so."

This was a withdrawal of his proposition of October 21st. There is no pretense that it had then been accepted. That Newby had notice of it clearly appears from his letter to appellant of November 8th, saying that Wiley had read to him the one last above quoted, and proceeding, "Want to say to you when you made that proposition to take \$4,350 subject to Stark's rights, told Mr. Wiley I would buy Stark's if I could and take the land. I saw Stark and traded with him—gave him \$150 for the lease, paid him \$25 down; was to pay him balance when you sent the deed; \$50 and interest of that was to go to you. I was to have possession of the place January 1st. I have Stark's copy of the lease in my possession and have until the 15th of this month to trade with you, and at that time can keep it by paying him the balance on it." The "proposition" here referred to was in a letter of September 29th, and was for

the sale of the land alone, and subject to Stark's rights. In this letter Mr. Newby says he accepted that proposition without any condition; but that was abandoned for the new one. No claim was ever before made upon it, nor is any made now. Appellant was never before informed of the terms or substance of the "trade" appellee then made with Stark, except as indicated in Wiley's letter of October 29th. From this letter of appellee, appellant would understand it was upon conditions not likely to be complied with, especially that which required a trade with himself by the 15th of the month. He probably did not receive the letter before the 10th. On the 11th he replied to it, referring to Wiley's letter advising him of the failure to arrange the payments of the rent notes (under the earlier proposition) and his compromise offer of October 21st, and saying that he (Newby) had prematurely effected a trade with Stark, etc., and concluding as follows: "If you will comply with the compromise offered in my letter of October 21st to Mr. Wiley, between now and December 1st, you can have the place on those terms. The payments may be changed to more cash down if you choose to make it so."

It is said this revived the proposition, which is conceded to have been withdrawn, and that an acceptance, making it a binding agreement, is shown by a letter from Wiley to Payne, dated November 19, 1891, in which he says: "Mr. Newby has shown me your recent letter to him and I saw what you wrote him, that is, that he could have the farm for \$4,550, clear of all fees except taxes for 1891, which price, \$4,550, should cover all rent due from Stark to you, \$1,500 cash, balance in one, two or three years, second payment not less than \$1,000, balance to be divided as he thinks best. Deferred payments at six per cent interest with mortgage on premises to secure deferred notes, as shown by your letter of the 21st of October, to me, by you referred to. He desires me to say to you that he accepted the proposition, but can not to-day, say whether he will pay you more than \$1,500 down, as he wants to see the man in Douglas County that he sold to, in order that he may see if he can get more

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money than the \$1,500 to pay down. He will want the judgment against Stark on this \$50 note transferred to him, also the lease and the \$300 note, so that he can have the chance to collect the rent of Stark that he will in the trade pay you. These transfers will, of course, be without recourse on you, so I suppose you had better make and send deed at once, and also authorize me, as your attorney in fact, to assign the lease, note and judgment to Newby, so that he can, when trade is fixed up, look for his rent out of the crop that is now on this land. Answer."

Perhaps there may be a question whether the language of appellant's letter to Newby revived the proposition of October 21st, or made a new one, incorporating all the terms of the former and adding others, viz., that Newby should comply with them by the 1st of December next, and also that he might change by increasing the amount therein required to be paid down, if he should choose to do so. The latter can hardly be deemed wholly immaterial, because appellant, in a letter to Wiley of October 17th, relating to the earlier offer, and replying to Newby's suggestion that he would like to have the privilege of paying on the notes at any time before due, in sums not less than \$100, had refused it, saying: "The back payments to me is an investment for interest." If these additions made it a new offer, then the declaration should have counted upon it, and the one counted on was not proved. It will be noticed that the alleged acceptance does not mention the limitation of time for compliance, nor fix (but expressly leaves unfixed) the amounts of the respective payments, both cash and deferred. And further and more important, that while reciting specifically the terms of the proposition, as he understood them, it makes no reference to the extinguishment of Stark's option to buy, and makes the payment down and notes for the residue secured by mortgage, as stated, the full extent of Newby's obligation.

Appellant notices this in his reply of November 23d, saying: "If I understand the letter, it means that Newby pays \$4,550, and I assign the judgment note and lease to him.

As to the consideration this is right, but the mode don't strike me as was intended in my letter to you of October 21st. It would not prevent Stark from demanding what he might claim as his rights, that is, to purchase upon the conditions contained in the lease, and he could bring suit for damages on account of this sale. Now I want to avoid all contingencies of trouble or law suit with Stark, or any one else. From Mr. Newby's letter I glean that he obtained the lease from Stark. This does not amount to anything one way or the other. * * * If Stark will sign away his rights in the lease to Newby, that vitiates his claims on me, or," etc., (suggesting another method), by Newby's depositing \$500 as security, and adding: "There might be some other way that our intentions could be carried out, but it is useless to make any propositions that leave me in any way involved with Stark or Newby. * * * I may have misunderstood your letter. If Newby has already bought Stark's privilege of purchase of him and has it properly transferred to him, Newby, then I am ready to make the deed and conclude the trade."

Appellant did not "make and send the deed at once," as Wiley had advised. He understood that an assignment of the lease by himself to Newby, which he inferred was what Wiley proposed, would not affect the rights of Stark. And further, that Newby had simply obtained possession of the lease from Stark, to be paid for as stated in Newby's letter of November 18th, but had no proper assignment in writing of Stark's interest. That letter said nothing of any such instrument. What he wanted, was, that Stark should "sign away his rights" in it. But he may have misunderstood, as to that, and added that if Newby had already bought and had them "properly transferred" to himself, then he was ready to make the deed and conclude the trade.

This was quite natural. It indicated no bad faith, but entire readiness to comply on his part with the offer he had made. He only wanted to have no misunderstanding and to know that Newby complied with the terms of that offer as he, Payne, intended and understood them.

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Wiley took this view of the letter, and sought to correct his misapprehensions; for on the 24th he wrote: "I have your favor of the 23d inst., and note what you say. Newby's proposition is based on the fact that he now holds the assignment of the Stark contract with you which he has purchased of Stark. It is in black and white. Some time since, at Stark's request, I caused a copy of the lease in our hands to be supplied to him, as he wanted a copy. On this copy he has made an assignment to Newby of his contract with you, and Newby has it in his possession and has paid Stark in part for it. * * * Hope you will see your way clear to send deed and close up. * * * Answer at once please, with deed."

But Wiley did not send the assignment referred to, nor any copy or particulars of it, nor say that he had himself seen it or a copy of it or what purported or was represented to be, or had any means of knowing or forming an opinion of its sufficiency for the purpose. Payne had a right to be furnished with the means of knowing that it was sufficient. He was not bound to take even the opinion of Wiley unasked. It was entirely proper that he should have, if he desired and requested it, a release to himself of all liability on the option provision. At least some proper evidence of it should be in his own possession or under his control. Such would have been the prudent, natural and usual course. Accordingly he wrote to Wiley on the 27th: "Yours of the 24th at hand. In reply would say that if Stark has sold his right of purchase to Newby and is satisfied, he will not object to signing the within agreement that I have drawn on the back of the copy that you sent me. Please fill in date and have him sign. Also fill in date and have Newby sign the lower agreement. Then have Newby define the terms, how much cash, and the definite payments, amounts of each, interest to be paid annually at Second National Bank. Return the note for his year's rent for my signature without recourse. Also send a mortgage blank. The judgment money he has provided for in the trade, so it won't be necessary for power of attorney. I will then exe-

cute deed and fill blank mortgage and draw notes for his signature and return to you.”

Appellant had not then been informed of appellee's choice between \$1,500 and a larger amount for the payment down, nor whether he had seen the Douglas County party. The amount of the deferred payments would depend on that choice. He therefore could not draw up the notes nor fill the blanks in the mortgage. Nor was it for him to do if he could. Appellee should have determined the amounts and prepared the papers. Appellant properly returned the blanks for that purpose. What he wrote to be signed by Stark was a simple waiver and transfer of his right to purchase the land to appellee; and by appellee an agreement to indemnify him against any claim for making the conveyance before the term had expired.

The next thing he learned about the matter was by letter from Wiley under date of December 11th, saying: “Your favor came duly to hand. It was a few days before I saw Mr. Newby. He signed the papers as you requested. Stark afterward came in but declined to sign, Newby then thinking he could get Stark to sign them by taking them to him, but he declined to do so. To-day Newby returned the papers and scratched his name off of it. He does not want to sign unless Stark will.”

This closed the correspondence. It does not appear that Newby or Wiley said or did anything further with reference to the trade until 23d of February, when this suit was commenced.

We think the evidence entirely fails to show that appellee complied or tried to comply with the proposition of appellant as first offered or as renewed; that he ever tendered any money or notes or mortgage, or agreed upon the amounts to be paid down and those to be secured, or furnished any proper evidence of any arrangement with Stark by which his option was assigned, released or extinguished; that he was ever in condition to make a demand for the deed and note proposed, or that he ever did make it.

And it fails to show any disinclination of appellant to

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have the terms of appellee's obligation definitely arranged, or, upon their performance, to execute the deed and deliver the notes. He demanded nothing unreasonable or unusual in relation to Stark's option. It was entirely proper that he should have exact information of the evidence of its extinguishment, and that it should reasonably appear to be sufficient. He did not demand any particular form, but only suggested or proposed one that would be satisfactory to himself. If it had in fact been extinguished, what he so proposed could not have harmed anybody, and was desirable to him. What Wiley had said of Stark and his refusal to sign the paper proposed, show that appellant had reason to ask for something of that kind. Yet it can not be known or presumed that he would have asked it, or been unsatisfied with the assignment that Newby was said to have obtained, if he had seen it or a copy of it or been told just what it was.

For the reasons stated, we think the court below erred in refusing to set aside this verdict. Its judgment will therefore be reversed and the cause remanded.

Waggoner et al. v. Stocks.

1. *Contract—Construction of.*—It appeared that the appellants made a verbal contract to bore a well upon appellee's land that would permanently furnish sufficient water for the wants of thirty to forty head of stock, and that sixty days should be allowed in which to test its capacity and permanency of the supply of water. Appellee put a pump in the well, which lacked thirty-five feet of reaching the bottom. *It was held* that by no fair construction of the contract could it be held that the appellants were required to furnish the necessary supply of water within the reach of such a pump. The capacity of the well, or the strength of the vein, could not be fairly tested in that way.

Memorandum.—Appeal from a judgment rendered by the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

The opinion of the court states the case.

F. M. HARBAUGH and R. M. PEADRO, attorneys for appellants.

W. G. COCHRAN, attorney for appellee.

OPINION OF THE COURT, BOGGS, J.

This was an action brought by the appellants to recover for sinking a well for appellee. The work was done under a verbal contract which, as we think, the evidence shows, was that the appellants should bore a well upon the appellee's farm that would permanently furnish sufficient water for the wants of thirty to forty head of stock, and that the appellee should pay therefor the sum of \$100, if the well, when fairly tested, should meet the demands of the agreement. The preponderance of the evidence is that the parties agreed that sixty days should be allowed in which to test the capacity of the well or rather permanency of the supply of water. The appellee testified that plenty of time was to be given. This contention we do not regard as important, for the reason that the action was not brought until sixty days in which to make the tests had expired, and not until after the appellee had, as he insisted, fully tested the well and found that it would not continue to supply water in sufficient quantity for the stock, according to the contract. Such alleged failure constituted the appellee's ground of defense. The judgment below was against the appellants, hence this appeal.

It appears from the evidence that appellants, under the contract, sunk a well for the appellee on his farm to the depth of 105 feet and reached a strong vein, the water from which flowed into and filled the well to within forty to fifty feet of the surface of the ground.

The parties, appellee and appellants, regarded the quantity of water thus procured, sufficient for the wants of the stock of the appellee, and the well completed, subject, however, to the condition that the vein would continue to furnish such requisite amount of water. It thereupon became the duty of the appellee to provide and place in the well a

pump, or other appliance suitable and proper for raising the water, and to operate the same in such manner as to determine whether the well would furnish a sufficient supply of water to meet the demands of the contract. The proof is that the appellee purchased and put in the well a pump, the pipe, or stock of which lacked, if we accept his testimony, thirty-five feet of reaching the bottom of the well. The party from whom the pump was purchased, testified that the stock, or pipe, was only fifty-five feet in length, from which, if true, it would appear that the bottom of the pump stock was fifty feet above the vein of the water.

By no fair construction of the contract can it be held that the appellants were required to furnish the necessary supply of water within the reach of such a pump. The capacity of the well, or the strength of the vein, could not be thus fairly tested.

Water, in abundance; might have been in the well, but too far below the end of the stock to be raised by the pump. It seems also clear, from the proofs, that, while the appellee was using the pump, the lower portion of the well became closed, or partially filled with sand and earth, or both, which impeded the flow of the water, and diminished the quantity that might otherwise have risen high enough to come within reach of the pump.

The well, for the depth of fifty-six feet, was twenty-two inches in diameter; thence for the distance of seventeen feet its diameter was sixteen inches, and its diameter was five inches the remainder of its depth. The five-inch hole became partially closed with sand or earth, so that the water could not rise through it.

It appears from the proofs most probable that the sand fell in from the sides of the five-inch hole, into which the pump stock did not extend. The earth came from the wider portion of the well above, being, there is much reason to believe, dislodged from the walls of such wider portion of the well by the motion of the end of the pump stock.

Had the pipe, or stock of the pump, been of such length that it would have reached into, and passed through, the five-inch

hole to the water in the vein, it would seem that the well would not have been closed up by the earth and sand, but might have yielded a sufficient amount of water for the wants of the stock it was designed to supply. The appellants devoted time and labor, and expended money in an honest and faithful effort to make a well for the appellee according to the contract, and under the proof, should have recovered, unless a fair test developed the fact that the supply of water procured was insufficient.

The contract did not require that the well should supply the requisite quantity of water within seventy feet of the surface, and nothing beyond a failure to do that, is shown.

We think the motion for a new trial should have been granted, and because it was denied, the judgment must be, and is, reversed.

49	154
95	1580

Chicago & Alton R. R. Co. v. Crowder, Administratrix, etc.

1. *Railroads—Proof Required of the Exercise of Due Care.*—As to the character of the proof required, of the exercise of due care on the part of an injured party, the true rule is, that where the circumstances attending an accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care; but where there is an entire absence of evidence of the conduct and acts of the deceased at the time of the accident or injury, that the party acted with due care can not be regarded as proven, because one conjecture is more probable than another.

2. *Railroads—Actions for Injuries—Evidence as Consistent with Carelessness, as with Due Care, etc.*—In an action for damages for the death of a railroad employe, where the evidence is as consistent with carelessness as with the exercise of due care, on the part of the injured person, there is neither proof nor inference to justify a recovery.

Memorandum.—Action for damages. Appeal from a judgment for the plaintiff, rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, WILLIAMS & CAPEN, ATTORNEYS.

Where a servant, by the exercise of ordinary care and caution, has as good an opportunity as the master of knowing that a location or apparatus is unsafe, he can not recover from an injury received therefrom. Wood on Master and Servant, 698; Honner v. I. C. R. R. Co., 15 Ill. 550.

Where it is impossible to tell from the evidence how an intestate received his injury, how he fell from the cars, what he was doing at the time, and what care, if any, he was using, the plaintiff has not proved any cause of action. Corcoran v. B. & A. Ry. Co., 133 Mass. 507; Riley v. C. R. R. Co., 135 Id. 292; B., C. R. & N. Ry. Co. v. Dowell (Iowa,) 15 Am. & Eng. Ry. Cas. 153; Wheelan v. C. M. & St. P. R. R. Co. (Iowa), 52 N. W. Rep. 119; C. & P. R. R. Co. v. State, 73 Md. 74.

There must be proof of the essential facts to fix liability on a party charged with the commission of a wrongful act. Where there is an absence of proof, or where, under the evidence, there is only a probability that an injury may have resulted from the wrongful act of the defendant, the court should take the case from the jury. Cotton v. Wood, 8 C. B. (N. S.) 568, cited in full in Thomp. on Neg. 364; Hughes v. C., N. O. & T. P. R. R. Co. (Ky.), 16 S. W. Rep. 275; Baulec v. R. R. Co., 59 N. Y. 357; B. & O. R. R. Co. v. State, 71 Md. 599; P. R. R. R. Co. v. Schertle, (Pa.) 2 Am. & Eng. Ry. Cas. 158.

Where the only evidence in a case is circumstantial, the plaintiff can only recover when the circumstances as proved are inconsistent with any other rational conclusion; they must exclude any fair inference or presumption that the accident was caused in any other manner, or by any other means. Wheelan v. C. M. & St. P. R. R. Co. (Iowa), 52 N. W. Rep. 119; Asbach v. C. B. & Q. R. R. Co., 74 Iowa, 248.

APPELLEE'S BRIEF, WELTY, STERLING & McNULTA,
ATTORNEYS.

It is culpable negligence for a railroad company to maintain obstructions near its track, dangerous to its employes.

C. B. & Q. R. R. Co. v. Gregory, Admr., 58 Ill. 272; Chicago & Iowa R. R. Co. v. Russell, Admr., etc., 91 Ill. 298; Illinois Central R. R. Co. v. Welch, 52 Ill. 183; Johnson, Admr., v. O., I. & W. R. R. Co., 31 Ill. App. Court, 183.

OPINION OF THE COURT, BOGGS, J.

James Crowder, husband of the appellee, administratrix, lost his life on the 19th day of December, 1891. At the time, he was engaged in the service of the appellant company as rear brakeman on a freight train, bound south on its road. The hindmost car of the train was a caboose, having on its top, near its north, or rear end, as the train was moving, a cupola. Within the caboose a ladder extended from the floor to the cupola. Sliding windows on each side of the cupola were so arranged that persons within could pass through them, out upon the roof of the car. When, on the day named, the train was approaching, and within something less than a mile of, Petersburg, the conductor, Mr. Drake, and Crowder, the deceased, were in this cupola.

The conductor informed the deceased that four cars were to be set out of the train at Petersburg, and directed him to attend to the rear end of the train, while he (the conductor) went forward and got out the cars. The conductor then opened one of the windows of the cupola, stepped out upon the top of the caboose, and turning about, told the deceased to go down into the caboose and fasten the latch upon the inside of the door. Crowder immediately descended, and from the floor of the caboose, looked up at the conductor, and said, "all right." He was not heard to speak again, nor seen alive afterward. The conductor went forward over the top of the cars to the front, or head end of the train, and remained there until the station of Petersburg was reached. When the work of setting out the cars began he noticed that Crowder was not at his post, and soon after discovered that he was not upon the train. He walked rapidly back in search of him, and came upon his lifeless body lying upon the ground upon the east side, and within five or six feet of the railroad track. The feet of the dead man extended nearly

to the track; his body at right angles with it. His head lay partly against the stump of an old piling, which projected ten or twelve inches above the surface of the ground. The skull was crushed, the stump of the old piling besmeared with blood, and brains and blood were splattered here and there upon the ground about the body, and upon the ballast of the railroad track. It was evident that the deceased had fallen or been thrown from the train; his head crushed and body mangled by striking the stump of the piling. It is estimated to be six hundred and twenty feet from the point where the caboose was, when the conductor parted with the deceased, to the place where the body lay. One hundred and twenty-one feet north of the body, at the side of the railroad track, stood a water tank. Attached to this tank by a hinge, by the use of which it might be raised or lowered, was a hollow tube, or spout, made of heavy sheet iron, used to conduct water from the tank to the tenders of engines on the road.

The appellee in an action on the case recovered in the Circuit Court a judgment against the appellant company for causing the death of Crowder, upon the theory that this spout had been negligently allowed to hang or swing so low upon its hinge that it would reach and strike a brakeman if he, when passing the tank, should be upon the top of a freight car near the edge of the roof, and that the deceased came out of the cupola window upon the edge of the roof of the caboose, to discharge his duties as rear brakeman, and was struck by the spout, rendered unconscious, and caused to fall to the ground and be killed. This is an appeal from the judgment so rendered.

The duty of the deceased as rear brakeman required him to be upon the top of the car before the train reached the whistling post for the station at Petersburg. The information and directions given him by the conductor amounted to an order to discharge this duty. Hence, it may be conceded that the jury were warranted in believing he made his way from the floor of the caboose, where he was when last seen, through a window of the cupola to the roof of the car, and that he fell or was thrown from the train to the ground.

It is further to be conceded that it sufficiently appears from the evidence, that the spout might have reached and struck a man of his height, had he been standing by the side of the cupola on the roof at the moment the car was passing the tank. Nothing was found upon the roof of the car or upon the cupola indicating that he had been injured there, or even that he had been there. Nor was there mark of blood, indentation or other indication upon or about the spout from which it could be supposed that it had come in contact with his person. A close fitting, knit woolen cap, worn by the deceased, was found upon the ground about half-way between the tank and the body, and on the opposite side of the track. It had neither rim nor visor, fitted the head closely, and was of a kind much worn by brakemen, because it could not be blown off by the wind easily, if at all. The cap was without mark, abrasion, or stain of blood, or anything to induce the belief that it had been removed from the head of the deceased by a blow or stroke of the spout.

On the side of the caboose below and perhaps extending back a little beyond the cupola, several spots, supposed to be blood, were found on the morning following the unfortunate occurrence. These spots were dry and so near the color of the painted side of the car that it was difficult for the witnesses to determine whether they were spots of blood or not. One of the spots was described as being "greasy," and some of the witnesses thought it was composed of brains or flesh and blood. Spots or stains of blood were found upon the rear lower steps of the caboose. Aside from the circumstances recited and the deductions logically arising therefrom, nothing is known of the manner or the cause of the death of Crowder. Perhaps the deductions of counsel for appellee, from these facts and circumstances, may best be made known by a quotation from their brief, viz.: "Crowder was then on the floor of the caboose and, looking at Drake, answered 'all right.' That was the last seen of him alive, and those were the last words he was heard to utter. He followed Drake out of the window to be on top

when the whistle-board was reached, as is required by the rules of the company. Crowder was just in the act of getting out of the window of the cupola or had just got out, and was straightening up, when the cupola came even with the tank. The window is small, about twelve by twenty inches, or fourteen by twenty at most. He was a large man, weighing 180 pounds, and standing five feet nine inches high. His body necessarily extended considerably over the edge of the car. The spout struck him violently upon the head and knocked off his cap, which jostled to the other side of the car and fell about half way between the tank and the place where Crowder's body was found. Crowder evidently had hold of the hand rail on top of the cupola, as this was necessary to enable him to get out and raise himself up on the narrow margin of the roof at the side of the cupola. When the spout hit him he clutched for an instant to the rail until he lost consciousness, or was knocked over on the edge of the roof, and his body resting there an instant rolled off and struck the stump of an old piling, 121 feet from the tank, being about the reasonable and natural distance at which you would expect to find the body, taking into consideration the momentum of the body when it left the car. As he fell, or while hanging to the car, the blood which flowed in consequence of the injury from the spout, dropped down and was drawn in by the action of air to the side of the car."

Such may have been the manner of his death, but there is force in the argument of opposing counsel that many of the conclusions arrived at by counsel for appellee rest upon conjecture and speculation as to mere possibilities and probabilities. The spout may have come in contact with the head of the deceased, and have removed his cap and inflicted a wound from which his blood flowed and dropped upon the side of the car, but as counsel for the appellant say, doubts of this nevertheless arise when it is remembered that no mark or stain of blood was upon the roof of the car, the cupola, the cap or the spout of the tank, and impartial minds might accept and adopt as equally probable, the suggestion that the blood (if it was blood) upon the side and steps of

the caboose, was thrown there from the body when it was dashed against the piling. That one of these spots was composed of his flesh or brains is as well shown as that any were of his blood. Is it not as reasonable to believe that this came from the body after it struck the piling where the flesh was mangled, the skull crushed, and the blood and brains of the unfortunate man scattered upon the stump, the ground and the ballast of the track, as to suppose that it came from a wound by a blow of the spout which crushed the skull so that the brain exuded and the blood flowed, and yet left no mark or stain upon the spout, the cap, the roof of the car or cupola? The theory advanced by counsel for the appellee as to the manner of the displacement of the cap and the injury to and fall of the deceased in the view of counsel for the appellant, is a plausible suggestion that his death might have been so caused, and yet it has no established fact in its support to inspire belief of its truth or give it weight above the other suggestions advanced by them, that the cap might have been displaced as the deceased drew his head out of the small window of the cupola, and in endeavoring to catch and retain it, he lost his balance and hold upon the hand rail, the cap escaped and was carried by the wind across the top of the car to the opposite side of the track and to the place where it was found, and the unfortunate man, though struggling to keep his place upon the roof of the car, was unable to do so, and was finally thrown therefrom to the ground and killed, or that he might, though not wounded or in any way injured, have lost his balance while out upon the roof of the car, and in an ineffectual struggle to recover it and avert a fall, displaced the cap from his head. The argument of counsel for the appellee, that it is entirely unreasonable to say that Crowder, an experienced brakeman, in the habit of running on the tops of cars day after day, should, in broad daylight, when the train was running at a steady gait, on a level track, with no snow or ice on the cars, lose his footing or stumble and fall from a car, seems to be answered by the argument that such an explanation of his death is the very first to arise in an impartial mind.

Either one of various suppositions not inconsistent with the facts known would account for his death, but it seems difficult to say that any one of them, more than another, finds lodgment in the mind as a belief created by the process of ascertaining unknown facts from the existence of facts that are known.

However this may be, the evidence is in another respect so clearly insufficient that we are impelled to award a reversal of the judgment.

There is no proof as to the exercise of due care upon the part of the deceased. The late lamented Justice Scholfeld, speaking for our Supreme Court as to the requirement of the law in this regard, in the case of the Calumet Iron & Steel Works v. Martin, 115 Ill. 358, said: "From the earliest reported case in our reports where the question was passed upon, to the present time, a period of more than thirty years, the general rule has been declared and recognized in opinions announced from time to time, that in order to recover for injuries for negligence it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his own safety."

As to the character of the proof required of the exercise of due care on the part of the party injured we think the true rule is, that when the circumstances attending an accident are in evidence the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care. But where, as in this case at bar, there is an entire absence of evidence of the conduct and acts of deceased at the time of the accident or injury, that he acted with due care can not be regarded as proven, because one conjecture is more probable than another. Tyndale v. O. C. R. R. Co., 31 N. E. Rep. 131. When the evidence is as consistent with carelessness as with the exercise of due care on the part of the person injured, there is neither proof nor inference to justify a recovery. Shea v. Boston & Maine R. R., 154 Mass. 31.

If there is sufficient evidence in the case at bar to sustain

the theory of the appellee as to the cause of the death of the deceased, out of the same evidence arises, we think, a strong inference of the want of due care on the part of appellee's decedent.

The deceased was an experienced brakeman, and had been performing his duties as such over this line of railroad for seven months. It would be only reasonable to assume that he knew the location of water tanks in use along the line of the road. A rule of the company, a copy of which had been given him and which it was proven he agreed to read and be governed by, advised him of the danger of such tanks to brakemen, and directed that he should, when working near "stock yards, coal schutes and water tanks," use the car ladders on the opposite side of the car from such structures.

One of the essential facts upon which appellee's right of recovery rests is that the deceased came out of the cupola window on the side of the car next to the water tank, and within twelve inches of the edge of the roof of the car, known to him to be a place of danger.

The rule referred to warned him of such danger and directed him how to avoid it in case he needed to reach the top of the car from the ground by way of an outside ladder. He came to the top of this car by an inside ladder, and although he might have stepped out on the roof on the side opposite to the water tank, through a window placed in the west side of the cupola for that purpose, he, of his own accord, if the appellee is right, opened the window nearest the tank and passed through it to the roof, and to a place of peril, against which he had been advised and cautioned.

It can not, therefore, be said that there is an absence of evidence of fault on part of the deceased from which an inference that he was exercising ordinary care might arise, and there being no proof as to his acts and conduct at the time of the accident, that he was acting with due care, can not be regarded as proven.

For this reason a new trial should have been granted.

The judgment must be, and is, reversed, and the cause remanded.

Catherine Clark v. Turner A. Clark.

1. *Married Women—Rights and Liabilities—Intermarriage of Debtor and Creditor as a Release.*—Under the common law a husband could not sue his wife, because they were one, nor could she be indebted to him because she had no power to contract with him during coverture, and all her indebtedness, to whomsoever contracted, by the marriage, became chargeable to him. Such indebtedness as to him must have been thereby extinguished since he could not be debtor to himself.

2. *Marriage of Debtor and Creditor.*—A woman being indebted to a man for money loaned, married him. He afterward sued her for the money and she pleaded the marriage as a release. *It was held*, in view of the change made by the statute in regard to husband and wife, that marrying her creditor did not discharge the debt.

3. *Husband—Legal Liability at Common Law.*—A husband's liability at common law rested solely upon the reason that by the marriage, he acquired such a legal right in whatever property she had, and such control of her labor and earnings, as deprived her of the means of payment.

4. *Married Women's Acts—Effect on the Common Law.*—The act to protect married women in their separate property, approved February 21, 1861, did not abrogate the common law rule of the husband's liability, because it still left to him the wife's earnings; but the act of March 24, 1869, in relation to the earnings of married women, by divesting him of that right, swept away the last vestige of the reasons upon which the rule rested, and therefore the rule itself must cease.

5. *Married Women—Statutory Rights.*—The act of March 30, 1874, to revise the law in relation to husband and wife, abolished the common law rule of the husband's liability and freed the wife from the disabilities and the husband from the liabilities imposed by the common law.

Memorandum. Assumpsit for money loaned. Writ of error to the Circuit Court of Champaign County to reverse a judgment rendered in favor of the plaintiff; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed June 26, 1893.

The statement of the case is contained in the opinion of the court.

PLAINTIFF'S BRIEF, J. O. CUNNINGHAM, ATTORNEY.

At the common law the husband, upon marriage, became liable for his wife's debts. 2 Kent's Commentaries, 126. The act of 1861, concerning the rights of married women, did not

change this rule. *Connor v. Berry*, 46 Ill. 370; *McMurtry v. Webster*, 48 Ill. 123.

This rule prevails whether the wife brings to her husband any personal property or power to earn money or not, and grows out of the relations existing between the parties. 2 Kent's Commentaries, 127.

DEFENDANT'S BRIEF, JOHN J. REA, ATTORNEY.

As the parties were married on the 20th day of November, 1890, this case should be governed by the law in existence at the time of their marriage, and not by the law as it existed prior to the act of 1874. This act makes a radical change in the law governing the relation of husband and wife concerning their property. "Should either the husband or wife unlawfully obtain or retain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same in the same manner and to the same extent as if they were unmarried." *Star & Curtis*, Chap. 68, Page 1278, Sec. 10.

The burden of proving a discharge of an indebtedness is always on the party pleading it. *Messmore v. Larson*, 86 Ill. 268; *Watt v. Kirby*, 15 Ill. 200; *Bonnell v. Wilder*, 67 Ill. 327; *Union National Bank v. Baldenwick*, 45 Ill. 375.

OPINION OF THE COURT, WALL, P. J.

The parties are husband and wife, married in 1890, but now living apart. This suit was brought by the husband against the wife for money lent at her request before the marriage. Pleas of non-assumpsit, the statute of limitations and releases were filed, on which issues of fact were joined. A verdict was returned for the plaintiff, a new trial denied and judgment rendered for the damages assessed and costs.

Though the parties contradicted as to the alleged loans, there was sufficient corroboration of the plaintiff to support the findings that they were made, and within five years before the commencement of the suit. No release was claimed except as the legal effect of the intermarriage. The

only question for our determination therefore, is, whether such was its effect.

Under the common law, of course, this action could not be maintained. The husband could not sue his wife, because they were one. Nor could she be indebted to him, because she had no power to contract with him during coverture, and all her indebtedness, to whomsoever previously contracted, by the marriage became chargeable to him. Such indebtedness as to him must have been thereby extinguished, since he could not be debtor to himself.

This legal liability rested solely upon the reason that by the marriage he acquired such a legal right in whatever property she had and to so control her labor and earnings as deprived her of the means of payment. While it applied in all cases, whether she brought to him much or little or no property, or was or was not able to earn any by her labor, it rested alone upon the reason stated. Whatever of force in support of it may be drawn from a consideration of the peculiar and tender personal relations of the parties is moral or sentimental only, not legal. Hence it was held that the "Act to protect married women in their separate property," approved February 21, 1861, did not abrogate this common law rule of the husband's liability only because it still left to him the wife's earnings (*Connor v. Berry*, 46 Ill. 370; *McMurtry v. Webster*, 48 Id. 123); but that the act of March 24, 1859, "in relation to the earnings of married women," by divesting him of that right also, "swept away the last vestige of the reasons upon which that rule rested," and therefore "the rule itself must now cease." *Howarth v. Warmser*, 58 Ill. 48; *Martin v. Robson*, 65 Id. 138; *Haight v. McVeagh*, 69 Id. 624. Finally, the act of March 30, 1874, to revise the law in relation to husband and wife (R. S. Ch. 68) abolished it in terms, and went much further in freeing her from the disabilities and him from the liabilities imposed by the common law. Among other things, it provides that she may contract with him as fully and freely as if she were sole, except for compensation to either for labor performed or services rendered for the other. *Hamilton v.*

Hamilton, 89 Ill. 349; Thomas v. Mueller, 106 Id. 36. She may contract with others as freely, except that she must have her husband's consent in order to enter into or carry on any partnership business. She may sue and be sued alone, and liabilities incurred by her contracts may be enforced by attachment or judgment, as if she were a single woman.

The contracts here sued on were not made under the statute, that is, between husband and wife, but were valid when made, at common law, and nothing has since occurred to invalidate, release or extinguish them. Appellant's liability for the indebtedness thereby incurred was not cast upon appellee by their subsequent marriage. The law then and still in force expressly left it upon her and her alone. These statutes are enabling acts, and though in derogation of the common law, the Supreme Court in *Haight v. McVeagh*, *supra*, declared it to be its settled policy to give them a liberal construction to effectuate the manifest intention of the legislature. If, by virtue of them, husband and wife may assume the relation of debtor and creditor, such a construction would enable them to continue in that relation as assumed before the marriage, if nothing in the statute appeared to prevent it; and the debt, whether contracted during or before the marriage, being valid and subsisting, the creditor must have the appropriate means of enforcing its payment against the debtor.

We are of opinion that the judgment of the Circuit Court was right and it will be affirmed.

McFadden et al. v. Lynn.

1. *Principal and Agent*.—It is a maxim of natural justice applicable with great force in cases of agency, that he who without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the other, whose confidence has been misplaced.

McFadden v. Lynn.

2. *When Bound by the Fraudulent Acts of an Agent.*—A principal holding out an agent as having authority to represent him, and thereby asserting or impliedly admitting that the agent is worthy of trust and confidence, is bound by all his acts within the apparent scope of the employment. Hence, the principal may be held for the fraudulent acts of the agent.

3. *Fraudulent Acts of an Agent—Reasonable Care by Persons Dealing with Him.*—As a general rule, the law does not protect one whose want of ordinary care has resulted in placing his adversary in an unfavorable position. When, under such circumstances, he seeks to cast the burden which must be borne by one of them, upon the shoulders of the other, he is told that had he exercised such care as might be expected of a reasonably prudent man, the loss would not have occurred.

4. *Agents—Exclusive Credit.*—A person dealing with an agent known to be such, may give him the exclusive credit, and in such case the creditor can not afterward elect to hold the principal.

5. *Agents—Liability of Third Persons Dealing with Agents.*—If a creditor voluntarily gives an enlarged credit to the agent of the debtor, or adopts a particular mode of payment whereby the principal is placed in a worse position than he otherwise would have been, the liability of the original debtor is discharged.

Memorandum.—Action of assumpsit. Appeal from a judgment for the plaintiff rendered by the Circuit Court of Menard County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed June 5, 1893.

APPELLANTS' BRIEF, T. W. McNEELY, ATTORNEY.

An implied or apparent power of an agent is never construed to extend beyond the obvious purposes and general usage and course of the business of the agency. The power exercised must be of itself necessary, usual or appropriate to the end contemplated by the agency. *Springfield Engine & T. Co. v. Greene*, 25 Ill. App. 106.

A distinction is drawn between acts within the apparent powers of the agent and acts apparently, but not really within his powers. For in the former the principal is liable, as he is responsible for the appearance of his agent's powers, but not for the latter, as the agent alone is responsible for the appearance of his acts. 2 Kent, 621, note 1; *Grant v. Norway*, 2 Eng. L. & Eq., 337; *Hubberstey v. Ward*, 18 Ib. 551.

Agents are held to the line of their employment, and any

deviation can only be allowed by usage, by the custom of the trade, or by special authority from the principal. Hence an agent to sell on credit can not collect. *Clark v. Smith*, 88 Ill. 298; *Abrahams v. Weiller*, 87 Ill. 179. To solicit orders, can not collect. *Reynolds v. Ferree*, 86 Ill. 570. To sell, can not receive the contract of sale. *Diversy v. Kellogg*, 44 Ill. 114. Story on Agency, Secs. 78, 101. To collect a note, can not commute the debt or release, or pledge the note. *Padfield v. Green*, 85 Ill. 529. To make a contract, can not receive money due on the contract. *Thompson v. Elliott*, 73 Ill. 221. To loan money, can not collect. *Cooley v. Willard*, 34 Ill. 68. To pay his own debt, can not use property of his principal. *Ingersoll v. Banister*, 41 Ill. 388. He can not satisfy debt of his principal, except for money, or to assume and pay the debt and release the debtor. To pay cash or draw bills, can not make the principal a debtor by purchase on credit. *Parsons v. Armor*, 3 Peters, 413.

A party dealing with an agent is bound, at his peril, to see the authority of the agent before dealing with him. *Peabody v. Hoard*, 46 Ill. 242.

APPELLEE'S BRIEF, N. W. BRANSON, ATTORNEY.

"The rule is that the principal is liable for the torts of his agent in the course of his employment, although the principal did not authorize or justify, or participate in, or even if he disapproved of them. If the tort is committed by the agent in the course of his employment, while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable, although done without his knowledge." *Keedy v. Howe*, 72 Ill. 133, 136; *Moir v. Hopkins*, 16 Ill. 313, 314; *G. & C. U. R. R. Co. v. Rae*, 18 Ill. 488; *Mason v. Bauman*, 62 Ill. 76, 81; *Cooley on Torts*, 534; *Story on Agency*, Sec. 452; *Johnson v. Barber*, 5 Gil. 425, 430; *Hungate v. Reynolds*, 72 Ill. 425.

A principal is responsible for the misrepresentations of his agent, in the apparent scope of his authority, as to third

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parties affected by the acts or words of the agent; it is the apparent scope of the agent's authority, and not his actual instructions that must govern. *Griswold v. Gebbie*, 126 Penn. St. 353, 19 Am. St. Rep. 878; *Wachter v. Phoenix Ass. Co.*, 132 Penn. St. 428, 19 Am. St. Rep. 600; *Millville, etc., Ins. Co. v. Mechanics, etc., Ass.*, 43 N. J. L. 652; *Wood on Insurance*, Sec. 392; *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368; *Wilson v. Thompson*, 1 Metc. (Ky.) 123; *Keller v. Singleton*, 69 Ga. 703; *Rhoda v. Annis*, 75 Me. 17, 46 Am. R. 354.

“Where the agent is authorized to transact all the principal's business of a certain kind, the very breadth of the employment, and the variety of the duties to be performed, necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and methods to be employed, or as to the scope and extent of the authority itself. Where so little is expressed, more may well be implied. The fact of such an authority of itself presupposes a general confidence bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained, and the outlines of the course to be pursued.” *Mechem on Agency*, Sec. 285; *Haskel v. Starbird*, 152 Mass. 117; 23 Am. St. Rep. 809; *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678; *Bishop on Contracts*, Sec. 1112; *Barwick v. English Joint Stock Bank*, Law Rep. 2 Ex. 259; *Mackay v. Com. Bank of New Brunswick*, Law Rep. 5, P. C. C., 394; 9 Eng. Rep. 202; *Swire v. Francis*, 3 App. Cases 106, 24 Eng. Rep. 56.

OPINION OF THE COURT, WALL, J.

Appellee recovered judgment against appellants for \$570.63, for the value of certain grain sold by the former to the latter through Hubbard, their agent. It appears from the evidence that appellants were in the business of buying and selling grain at Havana. They had an elevator with cribs and other appliances for handling and storing grain at

Oakford, and employed said Hubbard to act as their agent at the latter place, giving him general charge of their business at that point. He acted in that capacity for several years, and besides carried on a business of his own in the sale of hardware, agricultural implements, etc.

According to the arrangement between appellants and Hubbard, the regular course of business required the latter to pay for grain purchased by giving checks in favor of the vendors, upon appellants, specifying the number of bushels and the price paid. These checks were collected through the local banks.

The appellee had a quantity of wheat in the elevator. He had placed it there on storage at different times, and on the 1st day of September, 1892, he sold it to Hubbard for the appellants. The total amount to be paid therefor was \$591.53. Appellee then owed Hubbard \$20.90 for merchandise.

For the difference of \$570.63, Hubbard gave appellee his check on the First National Bank of Petersburg.

At the same time he drew a check in favor of appellee for the whole amount, \$591.53, on appellants, and requested appellee to indorse it, which appellee did, signing his name in blank, and handed the check back to Hubbard.

Which one of these checks was drawn first, and just what was said by Hubbard to appellee as his reason for wishing to transact the business in that way, are matters of some dispute.

It is apparent, however, that it was all one transaction, and that whatever Hubbard did say, and whatever reason was assigned, appellee was induced to consent, though somewhat reluctantly, supposing Hubbard's check would be duly honored by the bank on which it was drawn; but it was not paid, for want of funds. Hence this suit.

It seems that several times before, just such transactions occurred between the parties, as the appellee was in the habit of selling his grain to Hubbard, and was very often at such times in his debt for merchandise previously furnished, and all checks so drawn, before this one, were duly paid.

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It is not doubtful that appellee knew it was the general custom of Hubbard, when he bought grain, to draw a check in favor of the seller for the amount of the purchase upon appellants, but it is not shown that he knew of any special arrangement between appellants and Hubbard, by which the latter was restricted to that mode of making payment. A general agent is a person whom a man puts in his place to transact all of his business of a particular kind, or at a particular place. 2 Kent Comm. 9th Ed. 620. The acts of such an agent will bind his principal so long as he keeps within the general scope of his apparent authority, though he may act contrary to his private instructions, and this rule is necessary to prevent fraud and encourage confidence in dealing.

But an agent, constituted for a particular purpose and under a limited power, can not bind his principal if he exceeds that power.

The principal is bound by the acts of his agent if he clothe him with powers calculated to induce innocent third persons to believe he had due authority to act in the given case.

In the present instance Hubbard was the general agent of appellants to represent them in their grain operations at Oakford, with special instructions as to the mode of paying for grain. Appellee knew that payments were usually made in the way thus required.

The elevator, cribs, scales and other appliances for the purpose, were all in Hubbard's hands, and he was held out to the world as authorized to buy grain for appellants. This was, indeed, his authority. He was clothed with full power, apparently, for the purpose, and it does not appear that they ever interfered with his transactions, which ran up into very considerable amounts in the aggregate.

As already stated, Hubbard had no right to check on appellants for anything except grain actually purchased, but by the arrangement which he effected with appellee he was enabled to use the check given appellee to increase his credit at the bank for the purpose of meeting

a draft upon him then there for collection, and when his check in favor of appellee was presented there was nothing left with which to pay it.

It is a maxim of natural justice, applicable with great force in cases of agency, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the other, whose confidence has been misplaced.

So that a principal holding out an agent as having authority to represent him and thereby asserting or impliedly admitting that the agent is worthy of trust and confidence must be bound by all his acts within the apparent scope of the employment. Hence the principal may even be held for the fraudulent acts of the agent when done in the course of the employment.

It is necessary, however, that the third party should act in good faith, use reasonable care, and that he should rely upon the principal.

That Hubbard committed a fraud for which one of the parties to this suit must suffer is very certain. That appellants placed him in a position where he had the general opportunity, is also certain. That appellee gave him the special means by which he was enabled to commit the fraud is also certain. Appellee had a right to consider him trustworthy because appellants evidently so regarded him. But how far would this fact justify him in following an irregular and unsafe course of business to the detriment and injury of appellants?

As a general rule the law does not protect one whose want of ordinary care has resulted in placing his adversary in an unfavorable position. When, under such circumstances, he seeks to cast the burden which must be borne by one of them, upon the shoulders of the other, he is told that, had he exercised such care as might be expected of a reasonably prudent man, the loss would not have occurred. The term "innocent," as here used, describes one who not only acts in good faith, but with reasonable care. If

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he neglects to use such care he may mislead and prejudice the other, who has the right to presume that such care has been used.

One dealing with an agent, known to be such, may give him the exclusive credit, and in such case the creditor can not afterward elect to hold the principal. Story on Agency, Sec. 447; 2 Kent. Comm., 9th Ed., 630.

“It is a general principle that if a creditor voluntarily give an enlarged credit to the agent of the debtor, or adopt a particular mode of payment, whereby the principal is placed in a worse situation than he would otherwise have been, the liability of the original debtor is discharged.

* * * A receipt, given by a creditor to an agent or broker, does not necessarily, of itself, operate as a discharge to the principal, nor has it that effect, unless the principal appears to have dealt differently with his agent, in consequence of the receipt, as by passing it in his accounts and giving him further credit upon the face of the voucher. But where the receipt is the means of accrediting the agent with his principal, or altering the situation of the latter, the creditor can only resort to the agent.” Paley on Agency, Lloyd’s Ed., Secs. 250 to 254; Story on Agency, Sec. 449 and notes.

In *Heald v. Kenworthy*, 10 Exc. 739, cited in Story, *Ibid.*, Parke B., said: “If, for example, the principal is induced by the conduct of the seller, to pay his own agent, on the faith that the agent will settle with the seller, in such case the seller would be precluded from recovering, as it would be unjust for him to do so.”

The order drawn by Hubbard, upon the appellants, was in the following form:

“No. 1513. OAKLAND, ILL., Sept. 1, 1892.

Pay to T. T. Lynn, or order, five hundred and ninety-one and 72-100 dollars, (\$591.72), for 910.25 bushels of wheat, at 65 cents per bushel.

O. F. HUBBARD.

To McFadden & Co., Havana, Ill.”

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the back of the order is indorsed :

T. Lynn. Pay C. E. Coppell, Cashier, or order, for
tion, First National Bank, Petersburg, Ill.

J. W. ROBBINS, Cashier."

the face :

ason County Bank. Paid, 1892. Havana, Illinois."
pelleo knew that this was the usual and customary
of paying for grain bought by Hubbard for appellants,
l, it was the only way that is disclosed by the evi-
, and he must have known the effect of indorsing the
in blank and returning it to Hubbard. He says that
ard "wanted the order to show in his settlement"
appellants. Of course this was the use that would be
of it and he must have known that appellants would
pon the paid check as proof that the wheat had been
rly paid for. It was, when indorsed, in effect a writ-
ceipt for the amount in payment of the wheat therein
ied, and by indorsing it, appellee not only acknowl-
the receipt of the money, but he required appellants
the check to the legal holder.

ording to the evidence he hesitated a little to return
ndorsed to Hubbard and take Hubbard's check on the
for the balance, though previous transactions of the
sort had turned out safely. For some reason he was
hensive, but he did it. He knew he was incurring the
hich was apparent, and he knew the appellants would
arily pay the money to the holder of the check and
n the ordinary course of things they would have no
to suspect any misappropriation of the money by
ard. He must have known, if he reflected a moment,
ie was placing it in Hubbard's power to misapply the
g. Not only so, but that it would be necessarily inter-
ed with Hubbard's other funds and would be subject to
ecks and acceptances which might be legally charge-
against him by his banker. The very thing which did
place, was liable, plainly so, to occur. When appellee
sed and surrendered this check he gave up the absolute
ty of appellants and accepted the personal credit and
nsibility of Hubbard, and this for the sake of a settle-

ment of his private account with Hubbard in which appellants were not concerned. It would be grossly unjust to permit him to thus mislead the appellants into paying the amount of the check and then require them to pay a second time.

While it is true appellants held Hubbard out as their general agent and evidently regarded him as trustworthy and reliable, yet, as appellee knew, they paid for grain in the way stated by honoring checks given therefor which were their vouchers in the premises. Though exhibiting their general confidence in him they prudently adopted a mode of doing business which would afford ample protection to those who sold their grain and at the same time protect them against any failure of their agent to pay for grain sold to him for them.

Hubbard was transacting business of his own, and if he were permitted to handle their funds and mingle the same with his, he might, in case of misfortune in his affairs, involve them in liability to the sellers of grain. Therefore the mode adopted, while consistent with their confidence in Hubbard's honesty, was not only judicious, but was indispensable in order to protect them and the sellers of grain against loss in case of Hubbard's insolvency. When following the course thus provided the appellee was perfectly safe. By taking a different course a risk was incurred. How can he ask appellants to bear the consequences when they did not know the risk had been taken, and had in no wise induced him to take it?

When he thus chose to place it in the power of Hubbard to misapply the money, by depositing it where it would be exhausted by his other liabilities, by check or acceptance, he can not call upon appellants to make up this loss. They had no notice of any irregularity. Hubbard's name does not appear as an indorser, for appellee indorsed in blank.

He is estopped to deny the *prima facie* aspect of the transaction. By his own act, he placed the appellants in a position from which they can not retreat, whereby they must suffer if compelled to respond to his present claim. By indorsing the check and by delivering it so indorsed, the right

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money passed from him to the legal holder. He can permitted to repudiate the admission implied by the statement nor to say that he did not accept Hubbard's check in exchange for the balance due him on this

other aspect of the case, much discussed in the briefs, is to be noticed.

It appears that Hubbard became heavily involved, so much so that when he suspended operations and terminated his business, his indebtedness to appellants, actual and contingent, amounted to some \$13,000, for which he attempted to secure by a mortgage for \$10,000 upon his realty, and a judgment by confession for \$5,000, thus giving them a lien upon property.

The court insisted on behalf of appellee, that the appellants, by accepting of the security thus obtained, recognized the validity of the claim of appellee and are secured against loss if they

fairly construed, the proof merely shows that the security was intended to cover only such matters growing out of the business of Hubbard as were valid claims against appellants. The appellants were not at liberty to assume anything not binding on Hubbard, nor would the security cover anything gratuitously advanced.

The court held that Hubbard's unsecured creditors would have the right to hold appellants to this position and insist that when the liabilities chargeable were not, the property of Hubbard remained subject to his unsecured indebtedness.

The court is of opinion the judgment is contrary to the merits, and therefore be reversed and the cause remanded.

Butler et al. v. Meyer et al.

Practice—Record.—The court will not consider matters not appearing in the record.

Practice—Presumptions in Favor of Records.—Where a bill to foreclose a mortgage averred that it was duly executed, etc., the defendants

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were defaulted, thereby admitting the truth of these averments. The master in chancery, to whom the case was referred, reported it to be a mortgage deed. No exception was taken to his report and a decree followed finding it to be a proper mortgage deed; on error in the Appellate Court there appeared in the record immediately following the master's report, but not attached to or part of it, what purported to be a copy of the mortgage, showing no seals attached to the signatures of the mortgagors. It being assigned as error that the mortgage was void for want of the seals, *it was held* that the finding of the decree was supported by the averments of the bill. The report of the master, the admission of the defendant, etc., would induce the belief that the omission of the seals from the copy in the transcript was an oversight on the part of the copyist.

Memorandum.—Foreclosure. Writ of error to the Circuit Court of Mason County, to reverse a decree entered by that court from the complainant; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed June 26, 1893.

The opinion of the court states the case.

PLAINTIFFS' BRIEF, H. W. MASTERS AND WRIGHT & WRIGHT,
ATTORNEYS.

Every conveyance of real property must have the seal of those executing such instrument as an essential to its validity. It seems unnecessary to employ an extended argument or to brief many authorities.

The first paragraph of chapter 31 of the statutes of Illinois, entitled "Conveyances," reads as follows: "* * * Every deed, mortgage or other conveyance in writing, not procured by duress and signed and sealed by the parties making the same, * * * shall be sufficient * * * for the giving, granting, selling, mortgaging," etc.

Thus it will be seen that our State has retained the common law rule making the sealing of an instrument of conveyance as much an essential element to its validity as the signing of the same.

DEFENDANTS' BRIEF, WALLACE & LACEY, ATTORNEYS.

"Any agreement between the parties in interest that shows an intention to create a lien, may be in equity a mortgage." Jones on Mortgages, 168, 169. "Courts of equity

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pronounce that there is an equitable mortgage in the courts of law would be compelled to say there is a mortgage." The true test is, "Was the instrument a security for the payment of money? If it was, it is a mortgage." *Flagg v. Mann*, 2 Sum. 486. "Any instrument in writing to give a mortgage, or a mortgage executed, or an imperfect attempt to create a mortgage, or to appropriate particular property to the discharge of a debt, will create a mortgage in equity, or a lien upon the property intended to be mortgaged." *Daguerre v. Moore*, 31 Cal. 322; *Love v. Sierra*, N. L. W. and M. 639.

If a mortgage is not sealed the holder may proceed to enforce it in chancery as an equitable mortgage and it is not necessary to correct it." *McClurg v. Phillips*, 49 Mo. 474. Judgment, even at law, to foreclose such a mortgage, may be reversed. *Dunn v. Raley*, 58 Mo. 134. An instrument, although not technically a legal mortgage, will be treated in a court of equity as an equitable mortgage; and the attention of the court to the following additional cases: *Lake v. Doud*, 10 Ohio, 415; *Harrington v. Moore*, 3 Mo. 474; *Gill v. Clark*, 54 Mo. 415; *Miller v. R. Co.*, 36 Vt. 452; *Peckham v. Haddock*, 36 Ill. 38.

OF THE COURT, PLEASANTS, J.

On a bill filed by assignees of a promissory note of J. Butler and his wife to foreclose an alleged mortgage given by them to secure it. The averments and prayer are in the usual form. John R. Taylor and J. C. Small were also made parties defendant, as claiming some interest in the premises. The Butlers and Taylor were served with process personally, and Small by publication. Taylor having answered, it was dismissed as to him. The parties not appearing, were regularly defaulted, the cause was referred to the master to take proofs and compute the amount due, and upon the coming in of his report, a final decree was entered according to the prayer.

Plaintiffs Butler, prosecute this writ of error upon the

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sole claim that the instrument alleged to be a mortgage was not under seal, and therefore void.

It was not made an exhibit to the bill, nor in any other way a part of it, but was set forth briefly according to what was claimed to be its legal effect, adding: "As by the said mortgage deed, ready to be produced in court, will more fully appear." The master reported only his findings, without referring to any particular evidence. Nor was any preserved, stated, or referred to in the decree, which simply recites that the "cause coming on for a final hearing upon the bill, the dismissal as to the defendant, John R. Taylor, the default of the defendants, Marshall E. Butler, Emma Agatha Butler and J. C. Small, the report of the said master and oral and documentary proof taken and heard in open court; and the court, being fully advised in the premises, doth find," etc. There was no deposition taken nor any bill of exceptions or certificate of evidence.

Thus the record contains no evidence that the instrument was not sealed as well as signed and delivered by the grantors, unless it be the following, which appears in the transcript next after the master's report, but not as attached to, or part of it:

"And afterward, to wit, on the same day, appears the original mortgage and note sued upon, filed with said master in chancery, on the 13th day of February, A. D. 1891, which mortgage and note is in the words and figures following, to wit," etc., setting out what purport to be copies of the note and its indorsements, and of the mortgage, with certificates of its acknowledgment and filing for record. This copy shows no seal attached to the signature of either of the grantors. Across the face of each of these instruments, as copied, is written: "Filed with me, this 13th day of February, 1891. Lyman Lacey, Jr., Master in Chancery."

This somewhat singular statement in the transcript does not show to whom or how the original "appeared," further than that it was to the master, by being filed with him. It does not import that they were ever filed by him with the

clerk, in this cause. How the clerk got possession of them, if he did get it, and by what authority he copied them into the transcript, are matters of mere surmise. The bill distinctly averred the one here in question as a deed duly executed, acknowledged and recorded, and operating to convey the land in mortgage to secure the payment of the note, and stated a case fully entitling complainant to the relief prayed. By their default plaintiffs in error admitted the truth of these averments of its character and operation. The master saw and examined it. He found and reported it to be a mortgage deed. No exception was taken to his report or finding. If he did not also submit and file the instrument itself, as a part of it, how can the copy be regarded as properly in the record? And if he did, the presumption would be that the court also saw and examined it. The court found it to be a proper mortgage deed, and so declared by its solemn decree. Such finding and declaration, supported by the averments of the bill, the terms of the instrument, the acknowledgment and recording thereof, the report of the master, and the admission of plaintiffs in error, would induce the belief that the omission of seals from the copy in the transcript was an oversight of the copyist. They should not be heard to deny that it was sealed. Their claim, if true, is without merit, since it is manifest from the copy itself that they intended it as a mortgage security for the payment of the purchase money. Decree affirmed.

B. S. Green Company v. Blodgett, use, etc.

1. *Pleading—Consideration—Burden of Proof.*—Where a promise sued on is conditioned upon an event not certain to happen, it is not negotiable and does not import a consideration. A special plea under the statute is not necessary to make the want of a consideration available as a defense. Under the general issue the burden of proving a consideration is upon the plaintiff.

2. *Corporate Powers—Authority of its Agents to Bind.*—The ancient

49	180
55	104
55	560

49	180
159s	173

49	180
112	2311

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rule that contracts, to bind a corporation, must be attested by its common seal, has undoubtedly been greatly relaxed. Many contracts are now sufficiently evidenced by the signature of an agent expressly authorized for the company, and as to many others, authority to bind with or without writing is implied from the scope of the agency as generally understood; but these acts are such only as are required for convenience, amounting almost to necessity in the conduct of the ordinary business in charge of the agent according to custom.

3. *Powers of President—Implied Agency—Ultra Vires.*—The president of a corporation affixed the corporate name to the following instrument: "We, the undersigned, agree to pay to Charles H. Blodgett, or order, the sums set opposite our respective names, within thirty days after lots nine (9), sixteen (16), seventeen (17), eighteen (18) and nineteen (19), proprietor's subdivision of lots one (1) to six (6), original town (now city) of Bloomington, in McLean County, Illinois, are definitely accepted as a site for the postoffice building. If not paid when due, the sums subscribed to bear eight per cent per annum, from the time when due. B. S. Green Co., one thousand dollars (\$1,000), without interest." It did not appear what the business of the corporation was, but the court said, in passing upon it: "We can hardly conceive of any legitimate business, individual, partnership or corporate, to which it would pertain." *It was held*, not to be in any proper sense an act of business, but a simple, single, speculative venture, and therefore beyond the scope of an implied agency and not binding upon the corporation.

Memorandum.—Assumpsit. Appeal from a judgment rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the November term, 1892. Opinion filed June 26, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, KERRICK, LUCAS & SPENCER, ATTORNEYS.

"A voluntary subscription to promote a common object is open to the defense of a want of consideration, unless money has been expended or liability incurred, which would cause a loss to the person expending the money or incurring the liability." *Pratt v. Trustees*, 93 Ill. 478.

A plea of *non est factum* sworn to cast upon the plaintiff the burden of proving that the instrument was executed by the defendant. *Walter v. Trustees, etc.*, 12 Ill. 63; *Melvin v. Hodges*, 71 Ill. 422; *C. E. L. R. Co. v. Hutchinson*, 25 Ill. App. 476.

The courts of Illinois have probably gone further than

the courts of any other State in upholding contracts made by the officers of corporations. Yet, the extreme limit in such cases is when it is shown that the act pertained to the ordinary business of the corporation, and the contract was executed by the president, and the seal of the corporation attached. *Smith v. Smith*, 62 Ill. 496.

This rule has been many times so stated and approved by the Supreme and Appellate Courts of this State. *Phillips v. Coffee*, 17 Ill. 154; *Smith v. Smith*, 62 Ill. 493; *Sawyer v. Cox*, 63 Ill. 130; *Wood et al. v. Whelen*, 93 Ill. 162; *Life Ins. Co. v. White*, 106 Ill. 67; *McDonald v. Chisholm*, 131 Ill. 273; *Mullanphy et al. v. Schott*, 135 Ill. 655; *Joliet E. L. & P. Co. v. Ingalls*, 23 Ill. App. 45; *Adams v. Cross Wood P. Co.*, 27 Ill. App. 315; *Chisholm v. McDonald*, 30 Ill. App. 177; *Koch v. National B. Asso.* 35 Ill. App. 467.

"The corporate funds can not be given away gratuitously. The property and funds of a corporation belong to its shareholders, and can not be devoted to any use, which is not in accordance with the chartered purpose, except by unanimous consent. No agent of the corporation has implied authority to give away any portion of the corporate property, or to create a corporate obligation gratuitously." *Morawetz on Corporations*, Sec. 423; *Lawson on Rights, Remedies and Practice*, Vol. 1, Par. 403.

APPELLEE'S BRIEF, JOHN E. POLLOCK, ATTORNEY.

"It has been stated frequently, both in England and America, that an act performed by a corporation should be presumed to have been performed under authority of its charter until the contrary shall have been shown; that an act is *prima facie intra vires*, and that the burden of proving that it is *extra vires* rests upon the party claiming that the company has violated its charter." *Morawetz on Private Corporations*, 2d Ed., Sec. 324.

"If the objection urged is at all available, it should be made to appear by satisfactory proof that the contract in

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question was in violation of the charter of the plaintiff." Rider Life Co. v. Roach, 97 N. Y. 378.

The following authorities are conclusive of all the material questions which arise in the case: Kinsley v. Military Co., 41 Ill. App. 259; Richelieu Co. v. Same, Ibid. 268; Rider Life Co. v. Roach, 97 N. Y. 378; Whitsitt v. Trustees, 110 Ill. 131; Pratt v. Trustees, 93 Ill. 475; Smith v. Smith, 62 Ill. 493; Baptist Society v. Carter, 72 Ill. 247; McClure v. Wilson, 43 Ill. 356; Pryor v. Cain, 25 Ill. 292; Robertson v. March, 3 Scam. (Ill.) 198.

OPINION OF THE COURT, PLEASANTS, P. J.

The declaration in this case contained, besides the common counts, a special one on an instrument of which a copy, filed therewith, as the only cause of action relied on, was as follows:

"BLOOMINGTON, ILLINOIS, March 14, 1891.

We, the undersigned, agree to pay to Charles H. Blodgett or order, the sums set opposite our respective names, within thirty days after lots nine (9), sixteen (16), seventeen (17), eighteen (18) and nineteen (19), proprietor's subdivision of lots one (1) to six (6), original town (now city) of Bloomington, in McLean County, Illinois, are definitely accepted as a site for the post office building. If not paid when due, the sums subscribed to bear eight per cent per annum, from the time when due.

B. S. Green Co., one thousand dollars (\$1,000), without interest.

H. S. Swayne, Agt., \$1,500."

With three other subscriptions of \$500 each. It averred that said lots were definitely accepted by the government of the United States on the 29th day of February, 1891.

The pleas were, first, the general issue; second, *non est factum*, sworn to; and third, no consideration. To the latter, plaintiff replied that since the making of the subscription sued on, there had been a large expenditure of money for the purpose of accomplishing the object for which it was made. A demurrer to this replication was overruled, and defendant abided by it.

A jury was waived and the cause tried by the court upon the issues joined, resulting in a finding for plaintiff for \$1,011.66, damages; and a new trial having been denied, defendant took this appeal.

The errors assigned are the overruling of the demurrer to the replication, refusing to hold propositions of law submitted, finding the issues for plaintiff, denying the motion for a new trial and rendering the judgment entered.

The promise sued on, being conditioned upon an event not certain to happen, was not negotiable. It did not import a consideration, and a special plea was not necessary, under the statute, to make the want of it available as a defense. *Wilson v. King*, 83 Ill. 232. Hence, the overruling of the demurrer to that replication, if erroneous, could not prejudice the defendant; for under the general issue the burden of proving a consideration was upon the plaintiff.

There was evidence tending to prove it, which was not contradicted. Plaintiff testified that but for the subscriptions he would not have sold the property to the government for the price at which it was offered and taken; and that pecuniary expense was incurred and paid, in part, as we understand, by or for the plaintiff, in accomplishing the common object in view by him and the subscribers.

Whether the promise, if made by the appellant company, was *ultra vires*, we have no means of knowing nor any ground for presumption, since its business was not shown; but in that case the company should be estopped to assert it.

The question for our consideration, then, is, whether it was in fact or law so made. To that question the legal propositions refused had reference and application. Was the subscription properly admitted in evidence, over defendant's objections, to maintain the affirmative on that question?

B. S. Green, called by plaintiff, testified that at the time it was made he was president of the company and was so still, and that he signed the name "B. S. Green Co." to it. Upon that testimony, and no more, it was admitted. Afterward it was formally agreed that defendant was a corporation, organized for pecuniary profit under the act of April

18, 1872 (R. S. Ch. 8). And this is all the evidence in the record bearing upon the question under consideration.

A corporation can sign only by an agent. Was B. S. Green an agent for that purpose in this case? If authority on his part was essential to make it the promise of the company, as it certainly was, the plea of *non est factum*, verified, denied that he had it and cast the burden of proof upon the plaintiff.

The act referred to provided that "the corporate powers shall be exercised by a board of directors." Sec. 6. It does not define those of the president nor directly empower him in any case to contract for the company. If he had authority, express or implied; by or from the by-laws, or any action of the board of directors, or the business of the company and the powers and duties customarily exercised and performed by such an officer in its usual course, it was for the plaintiff to show it. Nothing was shown or offered to be shown, more than the facts above stated; and it is not suggested nor does it occur to us that there is any other, pertinent to the question, of which we can take judicial notice. All the authority that can be properly claimed for him must therefore be what can be derived by implication from these facts, viz., that he was president of the company, which was organized for pecuniary profit, but of whose business nothing whatever is shown.

The ancient rule, that contracts, to bind a corporation, must be attested by its common seal, has undoubtedly been greatly relaxed. Many are now sufficiently evidenced by the signature of an agent expressly authorized for the company; and as to many, authority to bind with or without writing, is implied from the scope of the agency as commonly understood. Thus a section boss may hire hands and purchase necessary tools and material for the repair of a railroad bed, fences, etc. So the president, as active manager of the business of any corporation organized for profit, must or may make contracts for it, as to which it would be impracticable to affix the corporate seal, and highly inconvenient even to reduce to writing. But we understand that

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which only as are required for convenience, amounting to necessity, in the conduct of the ordinary business of a company in charge of the agent, according to custom. Story on Agency (9th Ed.) pp. 62 *et seq.*; and in *Beverly v. Lincoln Gas Light & Coke Co.*, 118 Ill. 829, cited in note to Sec. 54. That this doctrine is held in this State, see *Ryan v. Dunlap*, 118 Ill. 329, *seq.* In *C., B. & Q. R. R. Co. v. Coleman*, 18 Ill. 493, in discussing the implied powers of the president of a company the court say: "Through him, numerous affairs of the corporation are transacted, and such incidents incident to the execution of the trust reposed in him of an ordinary character, arising in the routine of business such as custom or necessity has imposed upon the president may perform for the corporation without special authority." And in *Mitchell v. Deeds*, 49 Ill. 493, the same language is employed. See also *Joliet Light & Power Co. v. Ingalls*, 23 Ill. App. 45 (50); *The Cross Wood Printing Co.*, 27 Ill. 318; *Koch v. Union Building Assoc'n*, 35 Ill. 467-8.

The promise in question was clearly not of the kind recognized in these cases as excepted from the rule requiring attestation, or implied from the duties of the officer. Certainly it was not of an every-day or ordinary character. Nor does it appear to be related to the business of the corporation. *Smith v. The People*, 12 Ill. 493. We can hardly conceive of any legitimacy—individual, partnership or corporate—to such an act. It was not in any proper sense an act of a simple, single, speculative venture, and therefore it was not within the scope of any implied agency.

The cases cited for appellee relate to the question of contract for such a promise and not to the power or authority of the officer to make it for the corporation. For want of such authority here the judgment will be reversed and the cause remanded.

Ellis v. Dunsworth, Administratrix, etc.

1. *Contracts—Sale of Real Estate by Agent.*—Appellee approached appellant with a view of inducing him to list his real estate with his agency for sale. He was told that the farm was not for sale, in the sense that he was hunting a buyer, but like other people, he had a price, and that if any one came along and offered him that price he would sell it. That he had held his farm at thirty dollars an acre. Appellee said in reply, “Will you place your farm in my hands to sell?” to which he replied, “No sir! I am capable of transacting my own business, and so long as that condition continues, I do not want to employ any man to transact it for me. It is my farm, and I propose whatever there is in it, to make, and if you make anything out of the sale of my farm, you must make it out of the other fellow.” Appellee afterward advertised the farm in a paper owned by him, and by personal solicitations, endeavored to effect a sale, etc; took a man into his office, talked the matter over, told him it was a bargain, etc. The man went to appellant and bought the farm at \$31 per acre; upon the trial the jury found for appellee, for the amount. *Held*, that the evidence was sufficient to support the verdict.

Memorandum.—Action of assumpsit. Appeal from a judgment rendered by the Circuit Court of Hancock County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed June 26, 1893.

O’HARRA, SCHOFIELD & HARTZELL, and W. H. MEAD,
appellant’s attorneys.

APPELLEE’S BRIEF, SHARP & BERRY BROS., ATTORNEYS.

The jury are the judges of the weight the evidence is entitled to receive, and unless their verdict is clearly wrong, it will not be disturbed. *Goodell v. Woodruff*, 20 Ill. 192; *The City of Elgin v. Riordan*, 21 Brad. 600; *Chicago & R. I. R. R. Co. v. Hutchens*, 34 Ill. 108; *Howitt v. Estelle*, 92 Ill. 218. Where the evidence is conflicting and the jury are properly instructed as to the law of the case, their verdict must be regarded as settling the controverted fact. *Powers v. Cavanaugh*, 17 Brad. 77; *Kightlinger v. Egan*, 75 Ill. 141.

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Where an agent is employed to sell real estate, and such agent produces a person who ultimately buys the property, the agent is entitled to his commissions, although the trade has been consummated by the owner of the property. *Wilmington v. Cary*, 5 Baxter, 609; *Monroe v. Snow*, 131 Ill.

Plant v. Thompson, 16 A. S. R. 512; 42 Kan. 664.

In *Tyler v. Parr*, 52 Mo. 249, the court say: "The law is well established that in a suit by a real estate agent for the amount of his commission it is immaterial that the owner of the property and concluded the bargain. If, after the property is placed in the agent's hands, the sale is brought about, or procured by his advertisements and exertions, he is entitled to his commissions. *Sussdorff v. Schmidt*, 1 N. Y. 319; *Williams v. Leslie*, 111 Ind. 70; *Bell v. Kaiser*, 1 Mo. 150; *Armstrong v. Wann*, 29 Minn. 126; *Lloyd v. Matthews*, 51 N. Y. 124.

OPINION OF THE COURT, PLEASANTS, J.

Appellant owned a farm of 160 acres, near Augusta, where he resided, in Hancock County, and the deceased published a newspaper and carried on the business of a real estate agent at Plymouth, some five miles distant. About the middle of August, 1891, deceased called on appellant and asked if his farm was for sale, to which appellant replied not in the sense that he was hunting a buyer or advertising it, but that it was like other people's property, he proposed, that he had a price on it and if any one came along and offered him that price, he would sell. Being asked what that price was, he answered, \$30 an acre, at that time. Deceased then asked him if he would put the farm in his hands to sell, and was answered flatly, no; that he was capable of transacting his own business and wanted no assistance. Deceased then remarked that he couldn't do anything out of it in that way. Appellant told him that it was his farm and he proposed to make whatever he was to make. He then said "if you make anything at all you will have to make it out of the other fellow."

Deceased then went off and in a few days brought a man

who he said was willing to give \$31 per acre for it, and asked appellant to take him up and show it. He did so and says: "I showed him all its advantages and did my best to assist Mr. Dunsworth in effecting a sale to that man, and intending that if he effected that sale he would make \$1 on each acre, making \$160 * * * and I should have allowed it without a word." The man asked a week's time to reflect. Appellant told him that he didn't care to give him a minute, that if he wanted to trade with Mr. Dunsworth, he could. But seeing that Dunsworth was anxious he should have the time asked, he gave it, and said to the man "if no one came and offered more, the farm would be there at that price, one week from to-day."

The man did not return nor make the purchase. Deceased advertised the farm in his paper, sending several numbers containing the advertisement to appellant, and by personal solicitation endeavored to effect a sale. Some parties he took to the farm, and others he directed and sent there to examine it, but they were not induced to buy. At length, early in October, he saw Reuben Powell, took him into his office, talked up the matter with him, told him the farm could be bought for about \$5,000 and was a bargain, and getting nothing definite from him on that occasion, asked him to come again the next day, offering to show it to him, etc. Powell did not say whether he would or would not come. He did not come, but went and looked at the farm, and then went to appellant and bought it of him directly, for \$31 per acre, making a purchase on the 16th of October, 1891. Dunsworth, having learned the fact, called on him for the \$160, and being refused, brought this suit before a justice of the peace, and in the trial on appeal obtained a verdict and judgment for the full amount claimed.

It is conceded that the instructions to the jury, which were given orally by consent, were proper and fair; but appellant insists there were two errors, for either of which the judgment should be reversed, viz.: First, the refusal to set aside the verdict for want of evidence sufficient to support it, and second, the exclusion of one item of evidence offered for the defendant.

We infer from the argument that the findings claimed to be so unsupported are, that deceased was authorized by appellant to render service in procuring a purchaser, and that he was in fact instrumental in procuring the purchase by Powell.

As to the first, it is said that according to the testimony of both the parties, appellant distinctly and peremptorily refused to give him such authority; and it is true that they do not differ materially as to what was said in the conversation between them, which was what deceased relied on as evidence of his right to act and be compensated as broker. The account of it above given is that of appellant, and as we think, shows that the refusal was only of the authority or agency asked, and that was an agency to find a purchaser at the price of \$30 per acre. He wanted no broker or agent to get that price and take a portion of it for commissions, but had no objection nor reason to object to the services of a broker to get it and his commissions from the purchaser. It could make no difference to appellant whether he got them as commissions, directly from the purchaser, or from the price obtained in excess of that which he, appellant, was content to receive. Dunsworth's statement of that conversation, while substantially the same as that of appellant, somewhat more clearly shows an understanding that he was authorized to find a purchaser upon those terms.

The testimony of young Dr. Ellis, son of appellant, who heard the conversation, tends to show that he so understood, and appellant's statement that he did his best to "assist Dunsworth" in effecting a sale to the man he first presented, and would have allowed him the excess if it had been effected, is evidence strongly tending to show he also understood it the same way. The testimony of Dunsworth is, that with that understanding on his part, he advertised the property for sale in his paper and made the efforts he did to find a purchaser. We think this evidence was quite sufficient to support the finding that he was authorized by appellant so to do.

Upon the other question, Powell testified, as a witness for

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appellant, that "probably what Dunsworth said might have had some weight," and the circumstances seem to show it had. Residing in the neighborhood, in McDonough County, he had known this farm in a general way for years, and had been informed, perhaps a month before his conversation with Dunsworth, that it was for sale; but it does not appear that he knew anything about the price at which it was held or had looked at it with any view of buying it. He told Dunsworth at the beginning of their conversation, that he had sold his farm, but did not know that he would purchase another—that he guessed he would go west—and then inquired about another, the Bickford farm; but after the talk he did go to see the Ellis farm, and within two weeks bought it. Appellant did not find him nor in any way communicate with him. If anybody but Dunsworth, or anything but his solicitation induced him to look at and buy it, the fact does not appear. We are therefore of opinion that there was evidence on which the jury might well find that he was efficiently instrumental in procuring that purchase.

Appellant having said that he had advanced the price, was asked by his counsel to state the value of the lands around there when he sold, as compared with what it was when Dunsworth first came to see him; to which an objection by plaintiff was sustained. That ruling is the other error assigned.

The only object of the testimony offered was to show that he had not advanced the price capriciously, without some reason founded on the actually enhanced market value of lands generally in that neighborhood. But the question was not one of reason for making an advancement, but of his right to make it, under the circumstances, as against Dunsworth. He knew that Dunsworth had been and was endeavoring to find a purchaser at a price exceeding \$30 per acre, with the understanding that if he effected it, he was to have the excess for his compensation; and yet he did not offer to show, nor is it claimed that he gave him any notice of any advancement. If Dunsworth was not authorized to find a purchaser upon those terms, or

did not find one, appellant's right to make the advancement was absolute, and the reason for it therefore immaterial; and if he was so authorized and did find him, appellant had no right to make it without notice to him, for the reason referred to, or any other. In either case it was immaterial. We see no error in the ruling. Judgment affirmed

ROSS et al. v. HARBEN.

1. *Conveyances—Reformation of a Deed.*—R. entered into a contract with S., obligating himself, upon the payment of a certain sum of money, to convey to S. a tract of land. In the contract, S. stipulated to make a good and lawful fence around certain parts of the premises, prior to his being entitled to use and occupy the same. R. was to furnish three strands of wire for the west, south and east sides. S. was to be at all other expense in building, repairing and keeping up the fence. Afterward, by a memorandum signed by both parties, and attached to the contract, R. agreed that, upon the payment of the other sums of money, he would convey to S. another tract of land, adjoining the one named in the contract. In this memorandum it was stipulated that S. was to make, and keep up, at his cost, a good and substantial fence, that would turn all stock, not less than five feet high. S. afterward assigned the contract and memorandum to H., to whom R. and wife executed and delivered a deed, conveying to him both tracts of land. This deed contained the following clause: "The said party of the second part and his grantees, at his and their own cost and expense, to keep up a good and substantial fence, that will turn all stock, not less than five feet high." When completed the deed was folded by R. and handed to H., who accepted it without examination and filed it for record, without knowing that it was so conditioned. *Held*, upon a bill filed to expunge this clause from the deed by H., that the undertaking was personal in its character, and not in the nature of a covenant running with and attached to the land, and that H. was entitled to have it expunged from the deed.

Memorandum.—Bill in chancery to expunge a clause surreptitiously inserted in a deed. Writ of error to reverse a decree rendered by the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed June 5, 1893.

The statement of the facts is contained in the opinion of the court.

PLAINTIFFS' BRIEF, J. S. WINTER, ATTORNEY.

The rule is, to authorize the reformation of a deed, it must appear that through the mistake or fraud of the parties to it, the intention of neither has been expressed. *Maher v. Ins. Co.*, 67 N. Y. 283; *Avery v. Equitable Life Ass. (N. Y.)*, 23 N. Rep. 3; *Conger v. Chicago, R. I. R. R. Co.*, 15 Ill. 366; 2 Wash. R. Prop. 303.

In New Hampshire it has been held, where it was stipulated in a deed the grantee should keep up a fence around the premises granted, if the deed was recorded, it would bind his assignee, though not signed by him. *Burbank v. Pillsbury*, 48 N. H. 475; see also *Kellogg v. Robinson*, 6 Vt. 276.

"When the covenants are in the very contract by which the covenantor acquired his land, the performance of those covenants plainly forms a part of the consideration, without which the conveyance would not have been made." *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 146.

To reform a deed on that ground, it must distinctly appear from the stating part of the bill, that the written contract, as it stands, was the result of a mutual mistake, and the parties intended it to be otherwise. *Arter v. Cairo Democrat*, 72 Ill. 434; *Bent v. Coleman*, 89 Ill. 364; *Avery v. Equitable Life Ins. Co.*, 22 N. E. Rep. 6.

Whenever a grantor places in his deed a condition to be observed by his grantee which would be beneficial to his adjoining unconveyed land, it is taken as a part of the consideration accepted in the sale and purchase, remaining as a continuing burden on the land, in whomsoever, with notice, the title may rest, whether it is technically a covenant running with the land or not. *Carver v. Jackson*, 4 Pet. 87; *Dalafeld v. Parish*, 25 N. Y. 99; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Atlantic Dock Co. v. Leavitt*, 50 Barb. (N. Y.) 135; *Easter v. L. M. R. R.*, 14 Ohio St. 51.

The recitals in a deed after acceptance by the grantee estop him and his heirs and assigns from denying those recitals, and become conclusive evidence against the grantee

and his assigns in favor of the grantor and those claiming under him. *Byrne v. Morehouse*, 22 Ill. 603; *Ill. Ins. Co. v. Littlefield*, 67 Ill. 368; *Pinckard v. Milmine*, 76 Ill. 453; *Kershaw v. Kershaw*, 102 Ill. 311; *Rigdon v. Conley*, 141 Ill. 565; *Burbank v. Pillsbury*, 48 N. H. 425; *Tulk v. Moxhay*, 2 Phil. Ch. 777; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 146; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Torey v. Bank of Orleans*, 9 Paige (N. Y.) 649; *Easter v. L. M. R. R.*, 14 Ohio St. 51.

DEFENDANT'S BRIEF, H. W. MASTERS, ATTORNEY.

"A rule in determining whether the agreement or reservation is in gross or appurtenant, is, that it should be read in the light of the circumstances surrounding the parties when they made it." *Kramer v. Knauff*, 12 Ill. App. 115; *White v. Crawford*, 10 Mass. 185; *L. N. R. R. Co. v. Koelle*, 104 Ill. 455; *Karmuller v. Krotz*, 18 Ia. 352.

OPINION OF THE COURT, BOGGS, J.

Lewis W. Ross, one of the plaintiffs in error, entered into a contract with one George B. Sharp, obligating himself, upon the payment of certain sums of money, to convey to Sharp a small tract of land. In the contract is this stipulation:

"Said Sharp is to make a good lawful fence (around certain parts of the premises) prior to his being entitled to use and occupy the same, and as same is being fenced, Ross is to furnish to aid in building said fence, three strands of galvanized wire for the west, south and east sides, and said Sharp is to be at all other expense in the building, repairing and keeping up said fence."

Afterward, by a memorandum in writing, signed by Ross and Sharp and attached to the contract, Ross agreed that upon the payment of other sums of money he would convey to Sharp a tract of land adjoining that mentioned in the first or original contract. In this memorandum is found this stipulation: "Said Sharp is to make and keep up, at his own cost and expense, a good substantial fence, that will turn all stock, not less than five feet high."

Ross v. Harben.

Sharp assigned the contract and the memorandum thereto attached, to the defendant in error, Harben, to whom Ross and wife, plaintiffs in error, executed and delivered a deed conveying to him the premises described in the two instruments.

This deed contained the following clause: "The said party of the second part (defendant in error) and his grantees, at his and their own cost and expense, to keep up a good and substantial fence, that will turn all stock, not less than five feet high." When completed the deed was folded by Ross and handed to Harben, who accepted it without examination and filed it for record without knowing that the deed was so conditioned.

This was a bill in chancery brought by Harben against Ross and wife, the prayer of which is that the clause in question be expunged from the deed. Upon a hearing upon bill, answer, replication and proofs, the court rendered a decree granting the relief prayed for. This is a writ of error sued out by the defendants to the bill to obtain a reversal of the decree. The bill charges that the clause in question was fraudulently inserted in the deed for the purpose of deceiving and defrauding the complainant therein, but we find no proof in support of the charge.

The contracts between Ross and Sharp, as we construe them, required that Sharp should construct a fence of the height, character and strength specified, and so keep and maintain it while the contract remained an executory one, but there is nothing in the contract indicating that the parties contemplated that such agreement should be imposed as a burden upon the title to the land.

This undertaking was, we think, personal in character and not in the nature of a covenant running with and attaching to the title to the land. *Hartening v. Wetlee*, 50 Wis. 285; *Kennedy v. Owen*, 131 Mass. 431, 134 Mass. 227.

The duty of Sharp or his assignee, after having completed a fence in accordance with the contract, was only to make necessary repairs upon that fence at his own cost or expense until he received a deed. The contract did not devolve upon

him or those holding under him the burden of perpetually maintaining a fence about the premises, but only the burden of keeping and maintaining a fence until he should pay the purchase money of the land and become entitled to a deed from Ross. The additional burden of perpetually maintaining the fence is imposed by the clause inserted in the deed, and moreover, perpetually imposed upon any one holding the title under him.

The holding and decree of the Circuit Court, that this objectionable clause should be expunged from the deed, was, we think, correct, and it is affirmed.

Town of Normal v. Gresham.

1. *Negligence—Use of Ordinary Care.*—The degree of care used by a person in passing along a defective sidewalk and avoiding obstructions therein, is a question for the jury.

2. *Cities—Care and Negligence.*—A city which leaves obstructions in its sidewalks for months, to the peril, in dark nights, of those who do not know of them, can not, with grace, insist that those who do, shall on every occasion, when about to pass them, dismiss from their minds all interesting subjects of thought and hunt for hidden points of danger.

3. *Practice—Bill of Exceptions.*—The bill of exceptions is a pleading of the appellant; it is also a certificate of the trial judge and a part of the record, and not subject to contradiction.

Memorandum.—Action for damages. Appeal from a judgment for plaintiff, rendered by the Circuit Court of McLean County: the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, 1892, and affirmed. Opinion filed June 5, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, R. L. FLEMING AND A. E. DEMANGE,
ATTORNEYS.

If the defendant had traveled over the walk in question before and knew of the obstruction over which she claims to have stumbled, it was her duty at the time of the alleged

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injury, to have used a degree of care and caution commensurate with whatever known danger there was in the use of the walk at night. *Chicago, St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587.

APPELLEE'S BRIEF, BENJAMIN & MORRISEY, ATTORNEYS.

One may go upon a sidewalk known to be out of repair and dangerous, and yet if injured, may have a right of recovery, if ordinary and reasonable care is used. *Joliet v. Conway*, 17 Ill. App. 577; *Ellis v. Peru*, 23 Ill. App. 35; *Bloomington v. Chamberlain*, 104 Ill. 268; *Village of Clayton v. Brooks*, 31 Ill. App. 62; *City of Sandwich v. Dolan*, 34 Ill. App. 199.

The question whether ordinary or reasonable care was exercised, is a question of fact for the jury. *Village of Clayton v. Brooks*, 31 Ill. App. 62; *City of Sandwich v. Dolan*, 34 Ill. App. 199; *City of Rockford v. Hildebrand*, 61 Ill. 155, 160; *L. S. & M. S. Ry. Co. v. O'Connor*, 115 Ill. 255; *Babcock v. R. R. Co.*, 150 Mass. 467.

OPINION OF THE COURT, PLEASANTS, J.

June 1, 1891, the trustees of the town passed an ordinance for a brick walk, four feet wide, to be laid on the west side of Broadway, a street considerably traveled, along a block which was the third from the center of business. In pursuance thereof, in the fall following, the old plank walk of the same width was removed and the space it covered fitted for the new one proposed, by an excavation which was filled with rough cinders for a foundation. Along the middle line of this space there came, by use, to be a beaten path, a foot or less in width, such as would be made by persons passing singly. Parallel with the inner or west line of this space and a few inches west of it, was an old picket fence, which had been nearly ready to fall and was propped by three stakes, set in the cinders at a proper angle, and within six inches of the beaten path. There was no walk, improved or used on the other side of the street. Returning from a religious meeting on the night of February 17, 1892,

appellee struck her foot against one of these props and fell, breaking the radius of her right arm just above the wrist, straining the ligaments, and injuring her shoulder. For what she so suffered she recovered judgment in this action on a verdict for \$700; and the defendant, being denied a new trial, took this appeal.

The case went to the jury upon the evidence for the plaintiff, the defense introducing only one witness, whose testimony was confined to a description of the locality, and a plat or sketch of the sidewalk. For more than three months next preceding the accident the situation was substantially as above described.

Appellee was forty-eight years of age and a little near-sighted. The night was quite dark. Near each end of the block was a street lamp, burning oil. They were about four hundred feet apart and afforded but little aid to sight for more than fifty. Plaintiff was walking slowly, alone, and about four feet behind two ladies abreast. Others were at a little distance behind her. The place of the accident was nearly midway between the lamps. There was nothing noticed in her manner as showing that she was or was not taking particular care to keep in the beaten path or otherwise avoid the obstructions. She alone could know her thoughts.

On cross-examination she testified that she was familiar with this walk and had often noticed the stakes—had passed over it frequently for nearly or quite a year—perhaps ten or twelve times in that month, attending upon the protracted meeting then being held. The following portion of it is taken from the record:

“Q. What were you doing as you went along? A. I can't tell you.

Q. Didn't two people, just ahead of you, walk around the prop? A. I don't know.

Q. How far ahead of you were they? A. A few feet—three or four feet.

Q. You could have seen them if they walked out to go around the prop? A. I don't know that I was paying any attention.

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Q. Were you paying any attention to anything? A. I am usually trying to see where I am walking.

Q. Can you tell whether you was doing that that night or not? A. I can't say, but I think I was.

Q. Isn't it true you were not thinking about where you were walking at all? A. No, sir; I don't know as it was.

Q. You say you don't know that it is true; do you know it is not true? A. I went through such an experience I forget.

Q. Do you know it is not true that you were paying attention to where you were walking? A. I don't understand your question. I think I was paying attention.

Q. What makes you think it? A. Because I am usually very careful.

Q. You knew that the prop was there? A. It was too dark to see them that night.

* * * * *

Q. Can you say you were paying any attention when you fell? A. If I should say anything, I should say I was. I think I was paying attention. I am sure I was, because I always am.

Q. Isn't it true, that without thinking exactly where you were walking, your mind was on what you had heard at church? A. No, sir; I couldn't say that it was.

Q. Can you say it is not true? A. I was thinking about the walk. I am sure I was, because I always am."

It is claimed that in view of the circumstances, and particularly of her knowledge of the walk and its obstructions, she failed to take ordinary care for her own safety; and her own testimony, as above quoted, is mainly relied on for proof. She is charged with first admitting her want of attention, and then dishonestly attempting to "hedge;" growing bolder as she proceeded from "I don't know that I was paying any attention," to the final statement "I am sure I was."

The record itself does not so impress us, and her appearance and manner on the witness stand were to the jury important means of judgment as to her candor and truth-

fulness which we are denied. It seems clear that the admission referred to the action of the two ladies ahead. Nor did she pretend to state, as a fact positively remembered, that she paid attention to where she herself was walking, but only as a matter of inference and belief from the constancy of her habit. Perhaps this would not have been proper evidence in chief, but is not directly brought out; it came out naturally enough on the cross-examination, without objection. If it did not show actual care, it failed to show the want of it. The degree of care she used was a question for the jury. They had before them all that was known and remembered of her conduct and the circumstances. There appears to have been nothing uncommon or particularly noticeable in it; nothing that was not to have been expected, except the accident; and that, of itself, does not tend to prove negligence on her part. But the presence of the prop, as placed and left for so long a time, was evidence of it on that of the town. Appellee used the walk on the occasion in question about as others did who also knew its condition, and as she, with such knowledge, had been accustomed to use it. The difference is not shown to have been more than that she was walking on a line a few inches further west, without knowing or suspecting it, because of the darkness. A city that leaves such obstructions in its sidewalks for months, to the peril, in dark nights, of those who do not know of them, can not, with much grace, insist that those who do, shall, on every occasion, when about to pass them, dismiss from their minds what they have just heard at church, or other important or interesting subjects of thought, and hunt for the hidden point of danger. It should present itself in the night as well as by day, or be presented by suitable signals, to all who take such observation of the pathway before them as is usual in like cases. Ordinary care to avoid a known danger is proportioned to the danger, and therefore may often be of a very high degree. But reasonable care to know a danger, which is actually unknown, but might be known by the exercise of a very high degree of care, is not

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so proportioned. Here the obstruction was well known to appellee, but the place or point of it was not, at the time of the accident. We think there was evidence sufficient to support the finding that to see and avoid it, she used ordinary care under the circumstances. In *City of Sandwich v. Dolan*, 34 Ill. App. 204, it appeared that the plaintiff as well knew the condition of the walk where she fell, and the evidence of the care she used was her own statement that she knew the boards upon it were loose and always looked out for it, but could not say what particular thought was in her mind at the precise moment the injury occurred; which was held sufficient. The judgments of the Circuit and Appellate Courts in that case, were reversed by the Supreme Court, but not upon any ground affecting the question here considered. In *City of Rockford v. Hildebrand*, 61 Ill. 155, the defect complained of, was in the connection of the sidewalk with an alley crossing, some six or eight inches lower, which was made by a plank between them sloping at an angle of about forty-five degrees. The injury was caused by the slipping of plaintiff's foot, in stepping onto this inclined plank as he was passing along the sidewalk in a January night time when there was snow and ice upon the ground. As to his care he stated only that "he was walking along as he always walked."

An instruction was asked for the city that this "was not evidence that he was using due care," predicated upon the hypothesis that the walk was in an unusually icy and slippery condition, which was refused. The Supreme Court held that, although this condition would require a higher degree of care than would otherwise be called for, yet the instruction was properly refused; that the statement was evidence tending to show ordinary care under the circumstances; and therefore affirmed the judgment. In the case at bar, the evidence for the plaintiff was at least as strong. Besides her confident belief that she was paying attention to the walk, she probably supposed, at the time, and reasonably supposed, that she was following in the path of the ladies just ahead of her, although she did not remember that she paid any attention to know whether they did or did not

turn out to avoid the prop which tripped her, and we see no reason for interference with the finding of the jury upon this question. They were fully and properly instructed on that subject.

That was the only matter of fact in dispute. No complaint is made of any instruction given for the plaintiff, except the first. That is admitted to be correct, "taken as a whole," but is said to be misleading upon the main question, because a qualification put in near the end was not nearer the beginning. It declared the duty of the town to use reasonable care to have its sidewalks in reasonably safe condition for all persons using them, and the qualification was that such use should be with reasonable or ordinary care, for their own safety. We think it could not have misled the jury if it had been entirely omitted in that one, since it was clearly made in others, given for the plaintiff, and was the burden of most of those given for the defendant. The necessity of the qualification has been expressly denied by the Supreme Court, in the late case of *The City of Sandwich v. Dolan*, 141 Ill. 430.

At the close of the cross-examination appellee was asked: "Isn't it true that, through your attorney, you refused to permit other physicians, employed by the defendant, to examine your arm, to ascertain the extent of the injury? Upon which the court said: "I will not allow that at this time. I think the application is to be made in court, and she was not bound to act at that time." Besides, the question concedes that she did not refuse; that it was the act of her attorney. Defendant excepted, and though counsel do not here insist it was error, complaint is made that the bill of exceptions contains matter in that connection which is not true and may prejudice appellant. The bill of exceptions is a pleading of appellant. It is also a certificate of the trial judge and a part of the record, and not subject to contradiction. The matter referred to, however, excites no prejudice here. We approve the ruling of the court (*Parker v. Enslow*, 102 Ill. 273) and see no sufficient reason for reversing the judgment. It will therefore be affirmed.

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49	203
87	324

49	203
105	2479

1. *Mutual Benefit Associations—Pleading Statutory Exemptions—Jurisdiction.*—A plea by a mutual benefit association, based upon the theory that the action was not brought in the proper county, must state facts sufficient to show that it is not subject to the provisions of the law, providing that actions against insurance companies wherein an individual is plaintiff, may be brought in the county where the plaintiff resides.

2. *Assessments—Necessity of Payment—Accumulations.*—Where a certificate in a mutual benefit association required the holder to pay a mortuary assessment on the death of each member, and such further assessments as might be made by the directors or managers for expenses and collection costs, within thirty days after notice, and if not received within such time by the company, the certificate was to be null and void, it appeared that the holder of the certificate had paid all assessments, which appeared to have been excessive, resulting in a surplus. *It was held*, that if in making assessments for mortuary purposes, more was required and collected than was authorized by the contract, the excess would stand to the credit of the holder of the certificate. Under such circumstances he might well decline to pay assessments, until the amount thus to his credit was equaled by unpaid assessments.

3. *Mutual Benefit Associations—Certificates Providing a Remedy in Equity—The Remedy at Law.*—Where a certificate in a mutual benefit association provided that the application for membership and the certificate should constitute the complete and only contract between the holder of the certificate and the association, and that no suit or proceeding should be brought upon such contract except in equity, *it was held*, that this clause in the certificate providing for a specific remedy in equity was based upon the theory that an assessment would be necessary and collectible. Where, by the action of the association, the situation was so changed that it would have no right to make an assessment in payment of the certificate sued on, because by reason of a surplus none was necessary, this condition was abrogated, and the beneficiaries were remitted to the appropriate remedy at law.

Memorandum.—Assumpsit on certificate of insurance. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed June 24, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, W. C. CALKINS AND JOS. E. DYAS,
ATTORNEYS.

The decisions are uniform that whenever the purposes of associations come within the terms of Sec. 31 of the Corporation Act, such associations have not been held subject to the laws of this State relating to insurance companies. *The Golden Rule v. The People*, 114 Ill. 34; *The Golden Rule v. The People*, 118 Ill. 492; *Rockhold v. Canton Ben. Ass'n*, 129 Ill. 440. A plea setting up the defendant's right to be sued in his own county is a meritorious plea. *Humphrey v. Phillips*, 57 Ill. 135. And is not waived by pleading over. *Delahay v. Clement*, 3 Scam. 201; *Weld v. Hubbard*, 11 Ill. 573; *B. Y. R. R. Pass. Cond. Ass'n v. Robinson*, 38 Ill. App. 111.

The powers and duties of the directors of corporations are: To conduct the affairs of the corporation according to their best judgment, in furtherance of the ends of its creation; they are intrusted with the general management of the corporate affairs, and may lawfully do any act within the range of the corporate business which the corporation could do, unless restrained by the charter or by-laws. *Boone on Corporations*, Sec. 141.

It is undeniably the law that all business relating to the legitimate business of the corporation and authorized by its charter, may be transacted by its directors without the sanction of the stockholders. *Wood v. Whelen*, 93 Ill. 153, 165; *Beach on Corporations*, 227; *Morawetz on Corporations*, Sec. 511. An act of incorporation carries with it all power necessary to accomplish the objects of the act, unless it impairs vested rights. *Morris & E. R. R. Co. v. Newark*, 10 N. J. Eq. 352.

"Nor is a corporation limited to the exercise of powers specifically granted, but possesses all such powers as are either necessarily incident to those specified or essential to the objects and purposes of its corporate existence." *Le Couteulx v. City of Buffalo*, 33 N. Y. 333.

A corporation authorized to do any act may do it in any ordinary and proper manner. *Coe v. Columbus, etc., Ry.*

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Co., 10 Ohio St. 372. It has a reasonable discretion in the selection of any of the means, usual or proper * * * in view of the circumstances, to accomplish the object of its incorporation. Clark v. Farrington, 11 Wis. 306.

F.W. DUNDAS and R. L. MCKINLAY, attorneys for appellee. Citing American Digest of 1891, page 2426, Sec. 601; Demmings v. Supreme Lodge, etc., 14 N. Y. Sup. 834; American Digest, 1891, page 2426, Sec. 602; Force v. Supreme Lodge, etc., 41 Mo. App. 106; Shuffler v. Grand Lodge, etc., 47 N. W. Rep. 799; 45 Minn. 256; American Digest for 1890, page 2066, Sec. 648; 28 Mo. App. 463; Bonnert v. Insurance Company, 129 Pa. St. 558.

OPINION OF THE COURT, WALL, J.

This was an action of assumpsit brought in the Circuit Court of Edgar County, upon a certificate of membership issued by defendant below, appellant here, to John H. Baldwin, providing for the payment upon his death of a sum not exceeding \$2,500, as a benefit to his wife and children. The appellant filed the following plea in abatement.

“And the defendant, the Covenant Mutual Benefit Association of Illinois, by John Malick, its attorney in fact, comes and appears herein for the purpose of filing a plea to the writ of summons issued in the above entitled cause, bearing date May 25, 1891, and made returnable herein to said term of court, and the service thereon, and for no other purpose whatever, and defends, etc., and says: That at and before the time of the issuance of said writ of summons, and at the time of the service thereof, and for ten days prior thereto, and at all times since the commencement of this suit, the above named defendant was and is a corporation organized and doing business under the laws of the State of Illinois, for the sole and only purpose of affording and furnishing life indemnity, financial aid and pecuniary benefits upon the death of a member, to the widow, heirs, relatives, legal representatives, or designated benefi-

ciaries of such deceased members, and further avers that the said defendant association is, and since its organization has been, conducted by a board of managers who were, and are, members thereof elected annually, all residents of Illinois, and further avers that no annual premiums are, or ever were, required by said defendant, either in its by-laws or certificates of membership, or are paid to said defendant by its members as profit, or dividends, or otherwise from defendant association.

The defendant further avers that it had not at the time of the commencement of said suit or the issuance of said writ of summons and service thereof, nor ever had, any capital stock of any description whatever, and further avers that since its said incorporation it has derived its money and funds to pay its mortuary claims or benefits to beneficiaries of deceased members, solely by levying a mortuary call, or assessment, upon the members of said defendant association, and the collection of the same, to which is added the expense of the management, and in which the surviving members are notified of the object for which the money is collected, the names, addresses and amounts of certificates of deceased members, the amount to which the beneficiary is entitled, and has, since its incorporation, namely, January 9, 1877, had its principal office in the city of Galesburg, Knox County, Illinois, and not in said county of Edgar. The defendant further avers that before and at the time of the commencement of said suit of the said Annie Baldwin, and before and at the time of the issuance of said writ of summons and the pretended service thereof upon A. W. Berggren, as its president, that he, the said A. W. Berggren, was, and from thence heretofore has been, and still is a resident of and residing in said county of Knox and State of Illinois, and not in the said county of Edgar, and that he, the said A. W. Berggren, as president of the said defendant association, or otherwise, was not found and served with process in said action in the said county of Edgar, but was served with said summons in the said county of Knox. And the defendant further avers that this action is not a local

action, and this the defendant is ready to verify. Wherefore the defendant prays judgment if the court will take further cognizance of the aforesaid action."

A demurrer to this plea was sustained by the Circuit Court. This presents the first question to be disposed of. It is provided by Par. 3, Ch. 110, R. S., that an action against a life or fire insurance company wherein an individual may be plaintiff may be brought in the county where the plaintiff resides, and process may be sent to any county for service. Appellant, by the plea, sought to show that it was exempt from the operation of this provision and that it might claim the benefit of Par. 2 of the Practice Act, which requires generally the suit to be brought in the county where the defendant resides or may be found.

It is provided by Sec. 31, Ch. 32, R. S., relating to corporations not for pecuniary profit, after setting out the mode of becoming incorporated and the powers to be exercised, that "associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, except for permanent disability, shall not be deemed insurance companies."

Assuming, as we held substantially in *N. W. L. A. v. Stout*, 32 Ill. App. 31, that an association within this provision is exempt from the operation of Par. 3 of the Practice Act, it will be seen that the plea does not bring the appellant within the exemption.

1st. Associations here designated, can extend benefits to none except widows, orphans, heirs and devisees of deceased members, and members who have received a permanent disability, whereas the plea asserts that this association was organized for the purpose of furnishing life indemnity, financial aid and pecuniary benefits upon the death of a member to the widow, heirs, relatives, legal representatives or designated beneficiaries of such deceased members.

It extends its assistance to relatives, legal representatives

and designated beneficiaries, three classes in addition to those specified in the quoted statute.

2d. Whatever may have been in the mind of the pleader, the plea fails to aver that the members received no money as profit or otherwise except for permanent disability. That this is an essential feature of associations here referred to was held in *Coml. League v. The People, etc.*, 90 Ill. 166. We will consider this point more fully, hereafter.

We understand, however, from the brief of appellant, that reliance is had upon the provisions of "An act to provide for the organization and management of corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to the beneficiaries of deceased members," etc., Session Laws 1887, page 204.

This act is amendatory of an act passed in 1883, and the first section as amended is as follows:

"That corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits upon the death of a member to the widow, heirs, relatives, legal representatives or the designated beneficiaries of such deceased member for the purpose of furnishing accident or permanent disability indemnity to members thereof, and where members shall receive no money as profit, and where the funds for the payment of such benefits shall be secured in whole or in part by assessment upon the surviving members, may be organized subject to the conditions hereinafter provided."

The next section provides the form for the preliminary certificate to be filed with the auditor, showing, among other things, that "*bona fide* applications have been secured for at least \$500,000, by not less than five hundred persons," etc., and that the money required to be advanced is on deposit in some solvent bank ready to be transferred to the corporate treasury. The next section provides for a certificate of organization to be issued by the auditor, and it further provides that any association organized under the act of 1872, as amended by the act of 1874, *i. e.*, Ch. 32, R. S., first herein referred to, "for the purpose of benefiting widows, orphans,

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heirs and devisees of deceased members, may in like manner amend its articles of association in conformity to the provisions of this act.

Other provisions as to the manner of transacting business not important in this connection are contained in sections 4, 5, 6, 7 and 8. Section 9 declares that "All corporations, associations or societies organized under the provisions of this act, or that have heretofore been organized within this State under any charter, compact or agreement, or statute of this State, for the purpose of furnishing life, accident or permanent disability indemnity, or mortuary benefit, on the assessment plan, in accordance with the provisions of the first section of the act, shall not be deemed insurance companies nor subject to the laws of this State relating thereto, but shall comply with and conform to all the requirements and provisions of this act."

Then follow various provisions, requiring reports to be made to the auditor of public accounts, and conferring extensive powers upon him for the purpose of securing the proper conduct of the affairs of such associations, and the protection of those holding certificates of membership therein.

Assuming for the present purpose, that the terms of section 9, above quoted, exempt associations incorporated under the act from the provisions of Par. 3 of the Practice Act, the question is whether the plea brings the appellant within this act. It must appear (says Sec. 9) that the association is organized "for the purpose of furnishing indemnity or mortuary benefit on the assessment plan, in accordance with the provisions of the first section of this act." Turning back to section 1, we find it is a necessary condition that "members shall receive no money as profit."

This condition is fundamental and imperative. It is essentially a characteristic of the associations contemplated in section 1 of this act, as it was of those referred to in Sec 31, Ch. 32, R. S.

While this section 1 permits a wider range of beneficiaries as set out in the plea, it retains the limitation that members shall receive no money as profit.

The object manifestly was, to create a corporation, not for profit, but merely for indemnity and mortuary benefits.

As already stated, the plea contains no averment to this effect. ' It does aver that the association was organized for the sole purpose of affording indemnity; that no annual premiums are, or ever were, required by the association to be paid to it by its members, as profits or dividends or otherwise; that it has derived its money to pay mortuary claims and benefits, solely by levying mortuary calls, or assessments, and the collection of the same, to which is added the expense of management.

Perhaps it might be argued, that if these facts are true then the association is one not for profit. It is, however, a familiar rule, that pleadings must not be argumentative, but must be direct in their averments. Rule 111, Stephen on Pleading, p. 384. An apt illustration is found in an action of trespass for taking and carrying away the plaintiff's goods, where the defendant pleaded that the plaintiff never had any goods, upon which the court remarked—"this is an infallible argument that the defendant is not guilty, and yet it is no plea." But a closer scrutiny of the plea will create a grave doubt as to the proper argument to be drawn from the language employed.

While it is averred that the association derives its funds solely from mortuary calls, or assessments, it is not averred that these were not in excess of what was necessary to provide the indemnity and mortuary benefits for which the association was organized.

It may be, for all this plea avers, that an excess was levied and collected on these mortuary calls and assessments, and that a great surplus was thereby created, and is now in the corporate treasury, and that members are entitled to their *pro rata* share of this fund, which would be a profit. Whether so or not, the merit of this rule of pleading, as well as the propriety of applying it here, is apparent. The court properly sustained the demurrer to the plea in abatement. The error assigned upon this point will be overruled.

The plea in abatement having been held bad, the general

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issue was filed, and a jury being waived, the cause was submitted to the court. The court found for plaintiff and assessed the damages at \$2,860. A motion for a new trial was refused and judgment was rendered accordingly, from which the present appeal is prosecuted.

It is urged as error that the court refused the first and third propositions of law presented by appellant.

The motion for new trial presented two grounds: first, that the finding was contrary to the evidence; second, that the finding was contrary to law. No point was made upon the refusal of the court to hold said propositions of law. Having specifically assigned certain reasons in the motion for a new trial it would seem that the appellant can not, in this court, assign other reasons. *Hintz v. Graupner*, 138 Ill. 158. Hence we might decline to consider these propositions of law, but we are inclined to waive this technical view of the matter, inasmuch as the points raised by the propositions go to the merits of the case.

The first proposition was to the effect that the suit should have been in equity and not at law, and the third asserted that the failure of the deceased to pay mortuary call No. 102 rendered the certificate null and void.

This certificate was issued April 26, 1887, and recited that in consideration of the representations and agreements made in the application for membership and the sum of seven dollars paid as a membership fee, "and of the payment of such further amounts for mortuary assessments, expenses and collection costs as may be required in accordance with the conditions hereafter expressed," the said John H. Baldwin was constituted a member of said association with all the rights and privileges of the same, and that upon his death, he having complied with all the conditions of the certificate, an assessment should be levied upon the other members of the association, and the sum realized, to the amount of \$2,500, should be paid as a benefit to his wife and children.

The conditions referred to required the certificate holder to pay a mortuary assessment on the death of each member of the association of \$1, or such proportional part thereof as

might be necessary to raise the sum required for the payment of the claim, and to pay in addition such further assessments as might be made by the directors or managers for expenses and collection, costs not exceeding twenty-four cents per month; said mortuary and expense assessments were to be forwarded within thirty days from the date of notice thereof, and if not received within such time by the association the certificate was to be null and void.

It was further provided that the application for membership and the certificate should constitute the complete and only contract between the certificate holder and the association; that no suit or proceedings should be brought upon said contract, except in equity, nor should any action be maintained, except within one year from the death of the certificate holder.

The certificate holder agreed to pay such mortuary assessments as were necessary to meet claims arising upon the death of other certificate holders, not exceeding one dollar upon each death.

It is shown that the directors of the association adopted a by-law, under which assessments were made in excess of the amount necessary for such purposes, and that a fund was thus accumulated amounting at the time of Baldwin's death to nearly \$380,000.

This excess was nearly ten per cent of the assessments. In other words, but little more than ninety per cent of the mortuary assessments paid by Baldwin was applied to the payment of death claims. The residue went to make up the accumulation or reserve fund then in the hands of the association. He paid all the assessments made except the last, No. 102, which was made a short time before his death, and which he neglected, or declined, to pay. The amount overpaid by him on previous assessments was more than the amount of this unpaid assessment, and the question is whether his failure to pay this last assessment should avoid his certificate.

The contract between the parties was contained in the application, and in the certificate, and so long as the assess-

ments were made accordingly, the certificate holder was bound to pay them, and a failure therein would work a forfeiture; but the directors could not, without his consent, change the contract. If they even had the power conferred upon them to pass any by-laws, which is not shown, they could pass none to his injury in contravention of the terms of the contract. And if, in making assessments for mortuary purposes more was required and collected than was authorized by the contract, the excess would stand to his credit. Under such circumstances he might well decline to pay until the amount thus to his credit was equaled by unpaid assessments.

We are of opinion the failure to pay assessment No. 102 did not render the certificate null and void.

The next question is, whether the plaintiffs were bound to proceed in chancery.

Without discussing the point as to how far the jurisdiction of a court and the form of action may be affected by the terms of an agreement between contracting parties, we think it is clear that in this instance the remedy at law was well chosen.

The stipulation that no suit or proceedings should be brought except in equity, in view of what went before, that is, that upon the death of the certificate holder the association should levy a mortuary assessment upon the surviving members, and pay the proceeds, not exceeding \$2,500, to the beneficiaries, and for a failure to make such levy, if there was no surplus, and if there was no reason why such a levy could be successfully resisted by the survivors, the remedy is in chancery, was an apt one. But in the present instance the reason, which we have seen justified Baldwin in failing to pay the last assessment made upon him, would have justified those who survived him, in a refusal to pay an assessment on account of his certificate. According to the evidence all had paid the excessive assessments, and the result was an immense surplus.

Had the plaintiffs filed a bill against the association requiring it to make the assessment, no such relief could have

been had for the reason stated. The remedy obviously was that the association should pay from the funds then on hand, derived from over-assessments.

This clause in the certificate, providing for a specific remedy in equity, was based upon the theory that an assessment would be necessary and collectible. When, by the action of the association, the situation was so changed that it would have no right to make an assessment in payment of this certificate, because by reason of the surplus none was necessary, this condition was abrogated, and under such circumstances the beneficiaries were remitted to the appropriate proceeding at law. One of the counts of the declaration set up substantially this state of facts.

No demurrer was interposed thereto, and it may well be doubted whether the appellant ought to be allowed to raise the question as to the form of action for the first time in this court.

It is frequently ruled that where the proceeding is in chancery, the objection that it should have been at law can not be presented for the first time in an appellate tribunal.

But waiving this, we are of opinion the error assigned on this point should be overruled.

It is also urged as error, that the judgment was in favor of Anna Baldwin alone, when the suit was in behalf of Anna Baldwin and the children, Nettie, Rush, Rubie and John, by Charles Lamb, their next friend. The suit was brought originally in the name of Anna Baldwin alone. The declaration was so drawn. On the trial the appellant objected to the introduction of the certificate of membership, because it was payable to the wife and children, whereas the suit was in the name of the wife only, whereupon leave was granted to amend the declaration, introducing the children as co-plaintiffs, and averring their interest in the subject-matter of the suit, and the trial proceeded. Proof was made that the persons so named were the children of the deceased.

The case was taken under advisement, and at the next

term the record shows that "the court being fully advised, does find for the plaintiff, and assesses her damages at \$2,860," and the motion for new trial being heard and overruled, it was "adjudged that the said plaintiff do have and recover against the defendant, the sum of twenty-eight hundred and sixty dollars, her damages so found and assessed, and also her costs and charges in this suit expended," etc.

No objection was suggested below, by appellant, based upon this point. It appears that in most of the papers filed in the case, even after the amendment was made introducing additional plaintiffs, the cause was styled as though there was but a single plaintiff, to wit, Anna Baldwin. The order of court containing the final judgment, the motion for new trial, the bill of exceptions, and indeed the appeal bond, are all so entitled, and the case is so styled in this court. Manifestly, this is but a clerical error. After the court allowed the amendment of the declaration, the cause was in fact prosecuted by all the plaintiffs therein named, and because the judgment is in favor of the plaintiff—in the singular number—and the personal pronoun "her" is used instead of "their," is no reason for setting aside the finding and judgment of the court.

Had the mistake been observed and the attention of the court called to it, the necessary correction would have been made, as a matter of course.

We are disposed to regard this error as wholly unimportant, and that the judgment should be deemed and treated as a judgment in favor of all the real parties plaintiff; but to save all question as to the identity of the case, and to the end that the judgment may be a certain adjudication of the matter in controversy, the style of the cause will be so amended here as to show the names of all the parties plaintiff, and an order will be entered directing the Circuit Court to make such verbal correction of its records as may be necessary for the same purpose.

We find no substantial error in the record.

The judgment will be affirmed, with special directions as to the amendment of the record. Affirmed.

OPINION BY THE COURT ON REHEARING.

A petition for rehearing has been filed, in which it is represented that by mistake, the plea in abatement was imperfectly set out in the transcript, and that the plea contained an averment not appearing in the transcript, as follows:

“And further avers that no member has ever received any money as profit or dividends or otherwise, from defendant association.”

The petition is supported in this respect by the affidavit of counsel and the certificate of the circuit clerk, and it is suggested that a rehearing should be allowed to the end that the transcript may be so amended as to show a true copy of the plea. Without discussing the propriety of the action proposed as a matter of practice, we are not inclined to assent to it in this instance for the reason that we are unable to consider the plea good, even though it may aver as alleged.

By the terms of Sec. 31, Ch. 32, R. S., as well as Sec. 1 of the act of 1887, the phrase, “where the members shall receive no money as profit,” is descriptive of an essential characteristic of the organizations in view. It was intended by the lawmaker that the rule thus stated should be a part of the settled policy and practice of such organizations, not to be departed from. This plea, with the averment in question, merely declares that “no member ever *has* received any money as profit,” etc., but it does not aver that such was the rule and policy of the corporation.

For all that is averred it may be entirely within the scope and power and purpose of the corporation to pay profits in the shape of dividends or otherwise, to the members, whenever the directors may find it convenient and advisable to do so.

Again, a further inspection of the plea shows this corporation was organized January 9, 1877, presumably under the provisions of Ch. 32, R. S., and long before the passage of the act of 1883, which was amended in 1887.

It is not averred that the corporation thus organized availed itself of the provisions of the last named enactment, and it is to be presumed that it did not.

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Existing presumably under the provisions of Ch. 32, it can not extend its benefits to classes not enumerated in Sec. 31 thereof, and so the plea is obnoxious to the first objection stated in the opinion, heretofore filed.

No other points are urged in the petition and the rehearing will be denied.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FOURTH DISTRICT—AUGUST TERM, 1892.

Medley et al. v. The People.

1. *Conspiracy*.—Statement of the facts constituting the offense, is contained in the opinion of the court.

2. *Evidence—Statements Made at the Time of Doing an Act*.—The statement of a party, made at the time of doing an act, may be shown in evidence in connection with, and as a part of the act. So, where a party, claiming to have deposited a sum of money in a bank to the credit of a third party, a clerk of the bank who testified that no money had been deposited to the credit of said party, was asked, on cross-examination, whether, at about the time in question, a deposit had been made, and, having answered in the affirmative, he was then asked, "What was said at the time by the party making the deposit?" *It was held*, that an objection to the question was properly overruled.

3. *Evidence—Contents of a Lost Letter*.—A witness, upon the trial of two persons upon the charge of conspiracy, was permitted to testify to the contents of a letter written to her by one of the defendants. It appeared from the evidence of the witness that this defendant had been in correspondence with her for some time, in regard to the sale of certain property, and when the other defendant visited her for the purpose of procuring a bill of sale of the property, he took the letter from a basket in her room. Under this state of facts, *it was held* proper to allow proof of the contents of the letter, it sufficiently appearing that the defendants were acting in concert.

4. *Conspiracy—Failure to Accomplish the Common Purpose*.—Where an indictment for a conspiracy sufficiently charges the offense, and it sufficiently appears from the evidence that the defendants were acting in concert, the fact that they did not succeed in accomplishing their purpose, does not affect the question. Conspiracy to do a

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thing, and an effort made to carry out a common purpose, may be sufficient to constitute the charge of conspiracy; it not being necessary for the conspirators to succeed in their design.

5. *Instructions Based upon Evidence.*—Instructions should be given with reference to the facts of the case. So, where the proofs showed that two persons took possession of a building by direction of the agent of the owner, who proposed to sell it and to execute a conveyance of it to them, both parties treating the same as personal property, and as severed from the land, an instruction stating—"If one person takes possession of and makes improvements on the real estate of another without authority of the owner, such improvements inure to the benefit of the owner, and the person so taking possession does not thereby take a valid claim in law on such real estate; and if, in such cases, the owner sells the property on fraudulent pretenses or misrepresentations made to him by her, this is not obtaining property from the person taking possession as aforesaid by false pretenses," is not proper.

6. *Improvements, etc.—When They Do Not Inure to the Owner of the Land.*—Where a person takes possession of a building by direction of the agent of the owner, and with the understanding that he is to have a bill of sale of the same at an agreed price, both persons treating it as personal property, and as severed and disconnected from the land, and a license to use the land, then such person can enter on such land and make improvements without such improvements becoming the property of the owner of the fee.

7. *Instructions Based on Particular Parts of the Evidence.*—An instruction predicated upon a particular part of the evidence, and which selects out a single feature, on which it is based, and ignores other evidence, or which selects a particular branch of the testimony and calls specific attention to it without alluding to the gist of the main question at issue, and seeks to make the case turn on relative rights not in issue, is improper.

Memorandum.—Indictment for a conspiracy. Appeal from a conviction in the Circuit Court of Clay County; the Hon. CARROLL C. BOGGS, Judge. Heard in this court at the August term, A. D. 1892, and affirmed. Opinion filed September 8, 1893.

The opinion states the case.

RUFUS COPE, for appellants.

APPELLEES' BRIEF, H. W. SHRINER, STATE'S ATTORNEY.

There may be a conspiracy to do a thing, although the accomplishment of it may be impossible. *Ochs v. People*, 124 Ill. 399.

As to the law bearing upon the evidence to show a conspiracy, see 3 Greenleaf, Sec. 93; Wharton on Criminal Law, Sec. 1398; State v. Sterling, 34 Iowa, 443; Cowen v. People, 14 Ill. 348.

To constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design, nor is any overt act necessary to complete the crime. The offense is complete the moment the plan is made to pursue the common purpose. State v. Ripley, 31 Me. 386; Alderman v. People, 4 Mich. 414; State v. Pulle, 12 Minn. 164; State v. Straw, 42 N. H. 393.

OPINION OF THE COURT, PHILLIPS, P. J.

This is an indictment against appellants for a conspiracy. Sarah Hawkins, a resident of the State of Indiana, was the owner of a certain building in Flora, Illinois, which she offered for sale, and appellant, William E. Richey, was her agent. Hirsh Ettleson and Hugh McGee were desirous of obtaining the building for the purpose of establishing an evaporating business. Richey, as agent for Mrs. Hawkins, directed Ettleson and McGee to take possession of the building, and stated that a bill of sale would be made by Mrs. Hawkins to them for the same, for the price and consideration of \$200, and after they took possession they expended on the building the sum of about \$1,000 in repairs and getting it ready for their evaporation business, and had promised Richey, as agent for Mrs. Hawkins, that they would pay her the \$200 therefor. Richey was to procure the bill of sale. The contract price was finally agreed upon and bill of sale made out and sent to Mrs. Hawkins with instructions to sign and send it to First National Bank.

The bill of sale was made out on the 7th day of August, for the conveyance of the property to Ettleson, and it was inclosed to Mrs. Hawkins, and she asked to sign it, and send it to First National Bank, at Flora, to be delivered, on payment of \$200. Mrs. Hawkins signed the bill of sale, and sent it to Richey, as her agent. Ettleson from time to time inquired of Richey as to whether the bill of sale had been

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returned, and he replied that he did not know, and instead of delivering the bill of sale to Ettleson, delivered it to Medley, his co-defendant, and at the same time delivered a letter addressed to Mrs. Hawkins, in which he stated that Ettleson and McGee had failed, and had gone to Chicago, and introducing Medley, and advising her to take \$175, for the building, Richey then well knowing that Ettleson and McGee were still preparing for their business, and were almost daily inquiring for the bill of sale, and had already expended the sum of about \$1,000 in fitting up said building. Medley, after procuring the bill of sale, claimed the property from Ettleson and McGee, and ordered them to do nothing toward removing any part of the machinery or repairs put on the building by them. The indictment substantially sets forth the ownership of the property as being acquired by Ettleson and McGee, who had taken possession of the same, and transformed it at an expense of more than \$2,000, into an evaporating establishment, upon the promise of Sarah Hawkins, through her agent, that a bill of sale of the property should be delivered to Ettleson on the payment to the agent of \$200, and that Ettleson stood ready and willing to pay the sum of \$200 upon the presentation of the bill of sale, and the defendants feloniously conspired to obtain the establishment from Ettleson and McGee by false pretenses to them and Sarah Hawkins, with an intent to cheat and defraud Ettleson and McGee. It sufficiently appears that Ettleson placed in the bank the sum of \$200, to be used in paying for the property.

Ettleson, when called as a witness, stated that he had deposited \$200 in the bank to the credit of Mrs. Hawkins to pay for the property, and one of the clerks of the bank, being called by defense, testified that no money had been deposited by Ettleson to the credit of Mrs. Hawkins, but on cross-examination was asked whether at about the time mentioned, as stated by Ettleson, a deposit of \$200 had been made, and answered in the affirmative, and was then asked as to what was said by Ettleson at the time of such deposit,

which was objected to and objection overruled, and the defendants then and there excepted. And thereupon the witness answered: "This is to buy that property." The admission of this evidence is assigned as error. The statement of a party made at the time of doing an act may be shown in evidence in connection with, and as part of that act, and it was not error to allow the question to be answered. It is further insisted that the court erred in allowing the witness, Sarah Hawkins, to testify to the contents of a letter written her by Richey. Her evidence discloses the fact that Richey had been in correspondence with her, and when Medley, one of the defendants, visited her for the purpose of trying to procure a bill of sale for the property, a letter from Richey to her delivered, and by her placed in a work basket in her room, where Medley was then sitting, with another written by Richey, she says was taken from the basket by Medley. Under that state of facts, where the letter was thus taken possession of by one of the defendants as appears from this evidence, it was proper to allow proof of the contents of the letter, and the admission of that evidence was not error.

It sufficiently appears from this evidence that Richey and Medley were acting in concert for the purpose of endeavoring to procure the title to the property and get possession of the property, which was greatly increased in value by the expenditures made by Ettleson and McGee, and the indictment sufficiently charges the offense and ownership of the property; and the fact that they did not succeed in procuring the title, or did not succeed in getting possession of it, does not affect the question.

Conspiracy to do a thing, and an effort made to carry out that common purpose, may be sufficient to constitute the charge of conspiracy, it not being necessary for the conspirators to succeed in their design. The defendant asked the court to instruct the jury, if one person takes possession of and makes improvements on real estate without authority of the owner, such improvements inure to the benefit of the owner, and the person so taking posses-

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sion does not thereby take a valid claim in law on such real estate; and if, in such cases, the owner sell the property on fraudulent pretenses, or misrepresentations, made to him by her, this is not obtaining property from the person taking possession, as aforesaid, by false pretenses, which instruction the court modified by striking out the words "authority from the owner," and inserting in lieu thereof "in good faith, believing they have a right to do so," and to the modification of that instruction the defendants then and there excepted. Instructions should be given with reference to the facts of the case, and if Ettleson and McGee entered into possession of the property by direction of the agent of the owner thereof, who proposed to sell the building, and execute a bill of sale therefor, and both parties treated same as personal property, and as severed and disconnected from the land, and a license to use the land, then Ettleson and McGee could enter on such land and make improvements, without such improvements becoming the property of the owner of the fee, and hence the modification of the instruction was not erroneous. It is also insisted that the court erred in refusing the eighth instruction, which was as follows:

"In the second count of the indictment it is charged that Richey received a certain bill of sale, made by Sarah Hawkins to one Ettleson, and in regard to said bill of sale he acted as agent of Mrs. Hawkins; but if it appears that it was sent to him not at his own instance, and in disregard of his direction, he did not become agent by virtue of the bill of sale being sent to him through the mail, and he had a right to return it." This instruction is on a particular part of the evidence, and selects out a single feature, on which it was based, and ignored other evidence, and hence its refusal was not erroneous.

Errors are assigned in refusal of the ninth instruction, which was as follows: "The obtaining of a bill of sale from Mrs. Hawkins for the building that was standing on her lands, does not constitute the offense. But, in order to make out the offense, it must appear that Ettleson and McGee

actually had an interest of ownership in the property in question, and if their interest depends upon a conveyance by bill of sale from Mrs. Sarah Hawkins, which bill of sale had not yet been delivered, this is not sufficient to answer the description of the offense charged in the indictment, and in such case you must find defendants not guilty."

The charge in the indictment is conspiracy to defraud Ettleson and McGee. The evidence in the record shows that Richey, as agent, stated the price at which the building could be purchased, and, as agent, authorized Ettleson and McGee to enter into possession, and by reason of information conveyed to the owner of the property that was accepted by her, she made a bill of sale, and sent it to her agent to be delivered, and that agent, conspiring with Medley, delivered the bill of sale to Medley, and sought to have it returned to Mrs. Hawkins, and procure her bill of sale to be made to Medley, and the ninth instruction sought to narrow the evidence to the fact that the bill of sale to Ettleson and McGee had not been delivered, and it was not error to refuse that instruction.

The tenth instruction, the refusal of which is assigned as error, is: "If it appears, from the evidence, that Ettleson and McGee took possession of the property in question, relying on the telegram of Mrs. Hawkins that she wanted \$200 for the frame, and that no purchase was ever consummated, and that no other contract for the property was ever consummated, then defendants are not liable, under the indictment, for obtaining a bill of sale from Mrs. Hawkins to defendant Medley, though obtained by misrepresentation. Ettleson and McGee, under such circumstances, would have no legal ground to object to the sale from Mrs. Hawkins to defendant Medley, even though such sale was procured through false representations made to her." This instruction is objectionable for the same reason as the eighth instruction, as it selects a particular part of the evidence, and entirely disregards the question as to whether the conspiracy was to defraud Ettleson and McGee. The eleventh instruction, the refusal of which is assigned as

error, was: "Two telegrams read in evidence, though sent and received by the parties to whom sent, did not constitute a sale of the premises, and Ettleson and McGee could not acquire any interest in said property by reason of said telegram alone, and if they went into the possession of the property only on the authority of said telegram, they took the chances of being dispossessed, and the owner of the property had the right to sell it to any one else, regardless of them." Like the eighth and tenth instruction, this selects a particular branch of the testimony and calls specific attention to it, without alluding to the gist of the question charged in the indictment, and seeks to make the case turn on the relative rights of Ettleson and McGee with Mrs. Hawkins.

It was not error to refuse the eighth, ninth, tenth and eleventh instructions. The evidence sustains the verdict, and we find no error in the record. The judgment is affirmed.

Ohio & Mississippi Ry. Co. v. The People, etc.

49	225
149	663

1. *Pleading—Allegations of Time and Place.*—In an action against a railroad company, for violation of the statute requiring the engineer or fireman of any locomotive engine to ring a bell or sound a whistle before crossing a public highway, a declaration containing four counts, charging in substantially the same terms several violations of the statute, and stating the time of the violations as November 30, 1892, and the place, the intersection of defendant's road and the public highway at or near the southwest corner of section five, the southeast corner of section six, and the northeast corner of section seven, and the northwest corner of section eight, in township three, range thirteen west, in Lawrence County, is sufficiently certain, so far as allegations of time and place are concerned.

2. *Pleading—Sufficiency of Declaration—Debt on Penal Statute.*—In an action against a railroad company, for a violation of the statute requiring a bell to be rung or a whistle sounded before crossing a public highway, it is not necessary to allege in the declaration any description of the engine or train referred to, or to state whether it was a freight or passenger train, or at what time of the day or night the alleged train or

engine passed over the crossing in question, or in which direction it was running along the line of defendant's railway.

Memorandum.—Action for a statutory penalty. Appeal from the Circuit Court of Lawrence County; the Hon. CYRUS Z. LANDES, Circuit Judge, presiding. Heard in this court at the February term, 1893, and affirmed. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

POLLARD & WERNER, and A. J. LESTER, attorneys for appellant.

APPELLEES' BRIEF, S. J. GEE, ATTORNEY.

It is alleged that the declaration does not apprise defendant therein so that it could be defended against.

The precise form of this declaration was used and approved in the case of Galena & Chicago Union Ry. Co. v. Appleby, 28 Ill. 283, and a demurrer thereto overruled, and the trial court sustained.

All that can be required in this declaration is to follow the general rule of pleading: "As it is a rule of pleading that where a subject comprehends multiplicity of matter, and a great variety of facts there, in order to avoid prolixity, the law allows general pleading." Chitty on Pleading, 235; Kipp v. Bell, 86 Ill. 577.

A party in suit of this character is not required to plead with certainty to a particular intent; need he set forth in his declaration his evidence to sustain it? C., B. & Q. R. R. v. Sullivan, 21 Ill. App. 580; Eagle Packet Co. v. Defries, 94 Ill. 603.

Where particularity would lead to prolixity it is dispensed with, and a general form is allowed. Kipp v. Bell, 86 Ill. 577.

In declaring upon the statute, to describe the cause of action in the words of the statute is sufficient. Gebhart v. Adams, 23 Ill. 397.

OPINION OF THE COURT, SCOFIELD, J.

Appellee sued appellant in the Circuit Court of Lawrence

County, for violation of the statute requiring the engineer or fireman of every locomotive engine to ring a bell or sound a whistle before crossing a public highway. Appellant demurred to the amended declaration, and the court overruled the demurrer, whereupon the appellant elected to stand by its demurrer, and judgment was rendered in favor of appellee for fifty dollars and costs. The question thus presented for our consideration concerns the sufficiency of the declaration, which contains four counts, charging in substantially the same terms four several violations of the statute. The time of the violations, as stated in the counts, was November 30, 1892, the place was the intersection of appellant's road and a public highway at or near the southwest corner of section five, the southeast corner of section six, the northeast corner of section seven and the northwest corner of section eight, in township three, range thirteen west, in Lawrence County. Many grounds of demurrer were assigned, but only one of them is presented and insisted upon in the argument. It is urged that the "declaration" is uncertain and insufficient in that it in no way describes the engines or trains referred to therein, not stating whether they were freight or passenger trains, at what time or times of the day or night the alleged engines or trains passed over the crossing in question, in which direction the said engines and trains were running along the line of defendant's railway, neither in any other way does it apprise the defendant of what it will be required to meet on the trial." It seems that a case between the same parties for a similar violation of the statute was before this court at the February term thereof, 1892, in which the objections as above set forth were raised by the railway company and were held by this court to be untenable. This holding is decisive of the question now presented unless our views have been modified since the filing of the opinion in that case.

We have carefully reconsidered the question, and find no reason for a modification of our former holding. The case of the C. & A. R. R. Co. v. Howard, 38 Ill. 414, which is

relied upon by appellant as "full authority" for its contention in this case, holds no more than that the intersection of the railroad and public highway should be more particularly designated than by a mere statement that it was somewhere within the county. The exact point of the intersection of the railroad and public highway is set forth in the declaration before us, and the Howard case is not authority in support of the proposition that the pleader should state the nature of the train, the direction in which it was running, and the hour of the day or night in which it passed the crossing. "To require such particularity would render prosecution of this character exceedingly difficult, and almost operate as a repeal of the statute." *C. & A. R. R. Co. v. Adler*, 56 Ill. 344. A case in point is *St. L., J. & C. R. R. Co. v. Kilpatrick*, 61 Ill. 457, in which the ground of action was, that the railroad company opened the close in which the plaintiff's horse was confined, whereby the horse escaped, went upon the company's track and was killed by one of its trains. A demurrer to the declaration having been overruled, and the company having elected to stand by its demurrer, Kilpatrick's damages were assessed and judgment was rendered in his favor therefor. The Supreme Court in affirming the judgment, say: "The principal cause of demurrer appears to be the supposed want of an allegation of time and place, when and where the injury was committed. We think a fair reading of the count affords no room for this objection. All of the acts complained of, are referred to the first day of December, 1887, on which day the railroad was being operated by the employes of defendant, and the place is distinctly averred to be at the county aforesaid. "In the declaration before us, all of the omissions of duty complained of, are referred to the 30th day of November, 1892, and the place, under the ruling in the Howard case, is particularly given."

The judgment of the Circuit Court will be affirmed.

St. Louis, A. & T. H. R. R. Co. v. Corgan.

1. *Master and Servant—Duty of Servants Entering upon Employment.*—A servant, in entering upon an employment, assumes such risks as are usually incident to such employment. He is not bound to investigate or ascertain whether the common master has used reasonable care in the selection of those already employed, and with whom he is to perform his duties.

2. *Master and Servant—Employment of Incompetent Servants—Notice to Employer.*—An employe is warranted in assuming that his employer has discharged his duty in using reasonable care and caution in employing those with whom he is to work, and where he finds any of his fellow-servants incompetent, so that his position is extra hazardous, it is his duty to notify his employer, and if the latter, when so notified, fails to discharge the incompetent servants, unless the employe quits the employment, he will be deemed to have assumed the extra hazardous position.

3. *Master and Servant—Duty in Regard to Incompetent or Habitually Negligent Servants.*—An employer is not to knowingly employ or retain incompetent or habitually negligent servants, and when one servant is injured by the negligence of his fellow-servant, who is incompetent or habitually negligent, of which the master has knowledge, and of which the servant has no notice, the master is liable.

4. *Master and Servant—Incompetent Employes—Burden of Proof.*—In an action to recover for personal injuries resulting from an incompetent or habitually negligent servant, the burden of proving notice to the master retaining such servant is upon the plaintiff.

5. *Evidence—Reputation of a Servant Not Competent.*—Upon the trial of an action against a railroad company for personal injuries, based upon the ground of retaining in its employ an incompetent and habitually negligent engineer, witnesses were called for the express purpose of proving that the engineer was known by the nick-names of "Crazy Pete" and "The Wild Irishman," and were permitted to testify over the objection of the defendants. *It was held* that this evidence was not proper to show either that the engineer was negligent or incompetent, and was prejudicial to the defendant.

Memorandum.—Action for personal injuries. Appeal from a judgment rendered by the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Circuit Judge, presiding. Heard in this court at the August term, A. D. 1891. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, R. W. S. WHEATLEY, ATTORNEY.

Plaintiff, to recover, must prove, first, that the accident was occasioned by neglect or default of the defendant, and second, that the plaintiff was in the exercise of due and proper care, and that the injury was not the result of his own negligence or want of proper precaution. *C., B. & Q. Ry. v. Gregory*, 58 Ill. 272.

It was error to allow plaintiff to prove engineer's nickname. Opinions of witnesses should not be received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the jury. *City of Chicago v. McGiven*, 78 Ill. 347; *Hopkins v. I. & St. L. Ry.*, 78 Ill. 32; *Pen. Co. v. Conan*, 101 Ill. 93; *Linn v. Sigsbee*, 67 Ill. 75.

It is not competent to ask the opinion of a witness in such a way as to cover the question to be found by the jury. Such testimony is nothing more nor less than permitting the witness to usurp the province of the jury. *C. & A. Ry. v. Springfield & N.W. Ry.*, 67 Ill. 142; *Henry v. Hall*, 13 Brad. 343; *Doud v. Guthrie*, 13 Brad. 653; *Sullwasser v. Hazlitt*, 18 Brad. 243; *C., R. I. & P. Ry. v. Moffitt*, 75 Ill. 524; *C. & N. W. Ry. v. Moranda*, 108 Ill. 576.

HAWKINS & HAWKINS, attorneys for appellee.

OPINION OF THE COURT, PHILLIPS, P. J.

Appellee brings his action against appellant to recover damage, by reason of having been run over by a train, which caused the amputation of his leg. A trial resulted in the verdict for \$2,000, on which judgment was rendered, from which the defendant prosecutes this appeal. The declaration in this case proceeds upon the theory of the right of the appellee, who was head brakeman on a train of appellant, to recover by reason of the negligence of the defendant in retaining in its employ an incompetent and careless, negligent engineer, of which, it is alleged, defendant had notice. A servant, in entering upon an employment, assumes such risks as are usually incident to the employment. He is not bound to investigate, or find out whether the common master had

used reasonable care in the selection of those already employed, with whom he is to perform his duties. A servant is warranted in assuming that his employer has discharged his duty, in using reasonable care and caution in employing those with whom he is to work, and where a servant finds any of his fellow-servants incompetent, so that his position is extra hazardous, it is his duty to notify his employer, and if the latter fails to discharge the incompetent or unfit servant, unless he quits such employment, he will be deemed to have assumed the extra hazardous position. But the master is not to knowingly employ or retain incompetent or habitually negligent servants, and where one servant is injured by reason of the negligence of his fellow-servant, who is incompetent or habitually negligent, of which the master has knowledge, and of which the servant has no notice, the master is liable. *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100. And the burden of proving notice to the master, of retaining an incompetent, or habitually negligent servant, is on the plaintiff. *Stafford v. C., B. & Q. R. R. Co.*, 114 Ill. 244.

In this case we are met at the threshold with the admission of clearly incompetent and improper evidence to show the incompetency or negligence of the servant, whose negligence is alleged to have caused the injury, and to show knowledge on the part of the master. Witnesses were called for the express purpose of proving the engineer was known by the nick-name of "Crazy Pete" and the "Wild Irishman," and numerous witnesses were permitted to answer this question over the objection of defendant's counsel. This evidence would not be proper to show either fact, and could be but prejudicial to the defendant, and the question as to whether the master had knowledge of any incompetency or negligence on the part of the engineer is a close one, as is also the question as to whether plaintiff had knowledge of the character of the servant, and without objection, continued in the employ of the common master, and hence the evidence of the engineer being known by the nick-name of the character such as sought to be proven, could be but prejudicial, and will necessitate a reversal of the case.

The judgment is reversed and the cause remanded.

Illinois Central R. R. Co. v. Beard.

1. *Railroads—Public Crossings.*—Where a railroad constructed steps at the ends of its freight house platform, which was elevated three or four feet from the level of the ground, these steps being essential to the use of the freight house by its employes and the public, with whom it transacted business there, and being connected with no street, sidewalk, or other public way, the fact alone that the public used such steps in going to and from the freight and passenger depot, or, for convenience, used them to shorten the distance in going to and from different portions of the town, did not make them a part of a public crossing.

2. *Negligence—Walking upon a Railroad Track.*—It is negligence for a person to walk upon a railroad track, whether laid in a street or upon an open field, and he who deliberately does so, will be presumed to assume the risk of the perils he may encounter.

3. *Negligence—Knowledge of the Use of the Track by Person Passing Along or Across it.*—The fact that many persons use a railroad track in passing along or across it with the knowledge of the company, but without the legal right to do so, may have an important bearing upon the question as to the correctness of the act of the railroad in the operation of its trains resulting in an injury; in this, such an act may be mere negligence without such knowledge, for which there could be no recovery; but with such knowledge, the same act may be so grossly negligent as to evince wantonness indicating an utter disregard for life.

4. *Care and Negligence Relative Terms.*—Care and negligence are relative terms, depending largely upon known conditions; as, to run a train at a high rate of speed where it is known that persons are in the habit of passing along the track, or crossing it, although without legal right, may be wanton, for which wantonness, resulting in an injury, there could be a recovery, while, if run at the same rate of speed, without such conditions being known, and an injury occurred, there would be no liability.

5. *Gross Negligence—Not in Law an Intentional Mischief.*—Gross negligence, of itself, is not, in law, a defined and intentional mischief, although it may be cogent evidence of such fact. The term is not one which, grammatically at least, and apparently not in law, though frequently so applied, is a subject of comparison.

6. *Contributory Negligence as a Defense.*—Contributory negligence, such as that of a trespasser upon a railroad track, can not be relied upon as a defense, in any case where the action of the defendant is wanton, willful or reckless, and the injury ensues as a result. The comparison of negligence in such cases, under the doctrine of contributory negligence, must be understood to apply to the care required, or to the law of relation as to reciprocal duties, after discovery of the danger in which a party is, or to the recklessness or wantonness of the servants of the defendant in failing to make such discovery, and avert the calamity.

49	232
54	91
49	232
58	141

I. C. R. R. Co. v. Beard.

7. *Recklessness—Questions of—How Considered.*—A question of recklessness must be considered with reference to the specific fact and conditions as they existed at the time of the injury. It is not necessary, or even proper, to consider what might have happened to some other person at some other place on the track, by operating a car as was done at the time in question.

8. *Comparative Negligence—Application.*—The law of comparative negligence has no application unless the person injured was, at the time, in the exercise of ordinary care. Where the person voluntarily and unnecessarily placed himself in a position well known to be a place of danger and is injured, there can be no recovery for even gross negligence on the part of the defendant, his act not being willful or wanton.

Memorandum.—Action for personal injuries. Appeal from a judgment rendered by the Circuit Court of Union County; the Hon. JOSEPH B. ROBARTS, Circuit Judge, presiding. Heard in this court at the August term, A. D. 1892. Opinion filed September 23, 1893.

STATEMENT OF THE FACTS BY THE COURT.

Appellee recovered a judgment in the court below for a personal injury alleged to have been caused by the negligence of the appellant.

The declaration contains two counts, the first alleging that appellee was injured while he was attempting to pass over appellant's road at a public foot-crossing, by the negligence of appellant's servants in the operation of its cars; the second count alleging that the plaintiff on, to wit, the 11th day of October, A. D. 1891, was then and there crossing a certain other railroad of the defendant, then and there in the county of Union, State of Illinois, at, to wit, over and across a certain public foot-crossing leading from the passenger depot of the defendant in the city of Anna, in said county, over and across the said railroad of the defendant, to and toward the freight house of the defendant in the city aforesaid, said public foot-way leading thence to, over and across West Railroad street of said city, and the defendant was then and there possessed of a certain locomotive engine with a certain train of cars then and thereto attached, which said locomotive engine and train were then and there under the care and management of divers then servants of the defendant, who were then and there making

a running switch with the said engine and cars, and who had then and there driven the said cars upon and along the said railroad, unattended by said engine, or by said servants, from a great distance south of said foot-crossing, to wit, a distance of 200 feet, near and toward the public foot-crossing aforesaid, with great impetus, and at a great speed, to wit, a speed of twenty miles per hour; and while the plaintiff was then and there, and at said aforementioned point attempting to cross said railroad at said crossing, the defendant then and there by its said servants, although the said servants then and there knew that persons were in the habit of passing across the said railroad over and upon the said foot-crossing leading from the passenger depot of the defendant to the freight house of the defendant as aforesaid, wantonly, recklessly and with gross negligence drove said cars unattended by said engine or servants, and without any signal whatever, at a very great rate of speed along and upon said railroad of the defendant, and toward the plaintiff, and toward and across said foot-crossing, and without giving adequate, sufficient, or timely warning to the plaintiff, in order that he, the plaintiff, might avoid being injured by the approach of said cars, so that, and by and through the gross and wanton negligence and improper conduct of the defendant, by its said servants, in that behalf, the said cars then and there ran against and over and struck with great force and violence upon and against the plaintiff, and the plaintiff was thereby then and there greatly bruised, hurt and wounded.

The appellee describes surroundings and circumstances leading up to and connected with the accident substantially as follows:

“I live in Anna. Am thirty-six years old. Have been gardening and buying. Last fall I was buying some. I am acquainted with the passenger and freight house of defendant at Anna. My occupation calls me there, in buying and shipping. The passenger depot is just a little bit opposite the freight house. The telegraph office extends past the end of freight house; formerly there was a platform there.

The platform has been around the freight depot ever since I have been there. The passenger depot is on east side of tracks, and the freight house on the opposite side. The track runs north and south. The platform around the freight house next to the tracks is four or five feet high. On the way to the passenger depot from the freight house platform you go down steps. The steps are west of the freight house and lead to the post office. The walk there leads to it. It crosses Railroad street, and is of gravel. It has been there ever since I have been there. There is no fence west of the freight house nor south of it. There is no way to go from the freight house to the passenger depot besides the steps except to go by the express office and go across, 200 or 300 feet south. The crossing from the freight house to the passenger depot is used all the time. It has been in use ever since I have been there, and is used by everybody. The express office is north from the postoffice 200 or 300 feet. There are three tracks between the passenger depot and the freight house. The main track is next to the passenger depot, the next track on the west is called the pass track, and the next is called the house track. The house track is eight feet four inches from the center of the rail of the pass track. I was injured at this place on the 10th of October, 1891. The time of day was about 7:30. I came to that locality straight from Finch's livery stable, to see if there was a message for me at the telegraph office. I got a message and went under the signal light over the telegraph office to read it. The telegraph office is at the south end of depot. I then started to cross. There was a freight train on the pass track. I looked and there was no engine to it, and I got up on a coal car and walked across to the other side and was about jumping off, when Worthington asked me to take his valise and monkey-wrench. I got his valise and monkey-wrench and walked on across and stepped off. As I stepped off I stumbled. My foot caught on some cinders and I stumbled and fell. I fell right directly across the rail, right west. I made an attempt to get up in this position facing the west, kind of angling in this shape. The

corner of the car struck me and threw me around on my back, and that threw this right shoulder up against the rail, and the flange of the wheel (the rail is level with the ground) cut this arm off, or mashed it so it had to be cut off. When I stepped up the freight train was on the pass track—the middle track. When the freight train came in I was in the telegraph office. It was going south. When I stepped on the car the engine was below the crossing, not attached to the train. At that time the freight train was the only train I saw in the depot yard. There was nothing across the main track, and I saw no cars on the house track. If there had been any cars near where I was I could have seen them. Just prior to the time I stepped or jumped off the car the engine was somewhere below the freight depot—could hear it there. I could not say how far below. The switch that connects the middle or pass track with the house track is just below the public crossing. This switch is about 150 or 100 yards from the point where I was attempting to cross. I never saw any cars only the one I was standing on. I looked up and down the road as far as I could see, to ascertain the presence of cars. I could not see very far down the road, because it was dark. At the time I jumped there was no cars on the house track that I could see. Standing on the coal car I could see down as far as the south end of the depot, and I guess that is fifty feet. It was so dark I could not see to read anything without getting in the light. Standing on the car where I was standing I could probably see a freight car fifty feet. There was no cars on the house track to obstruct my view for a distance of fifty feet south. The cars that struck me were coming from the south. There were two of them. They were coming at pretty rapid speed. Could not say how fast. I never saw them till they struck me in the chest. I was not down more than a second. Just as soon as I could spring up I did so. Those cars went up about fifty feet to the lime house and stopped. I heard them strike. They struck before Worthington got me on my feet. They struck awful hard. No engine with them. There was nobody on the cars that I could see. There was

no light. If anybody was there I did not see their light. I did not receive any warning of the approach of the car. I was in a rising attitude with my feet to the west. The train knocked me north, and I fell on my back. My right arm was under the car somewhere. My arm was never across the rail, but was over the rail. When I started across the track I was going to the postoffice and home. I could have gone to the public crossing. I could have gone to the postoffice that way and wasted an hour or two. There is plank at the public crossing on both sides and a plank walk that led up to the corner and connected with another walk that led to the postoffice. I don't know that there was anything that prevented me from going that way. I suppose the place where I attempted to cross was the railroad company's right of way. Those tracks are called switch tracks. At the time of the accident I knew that cars were switched on both those tracks at all times in the day and night. The train that was on the pass track had not been there very long. I think it came while I was in the telegraph office."

The witness Worthington, to whom appellee refers as being with him, testifies substantially as follows:

"When the plaintiff climbed over the car I was standing somewhere about the center of the main track, or between the two tracks. I was four or five feet from the plaintiff. He got up between the two cars and started over. He got hold of the handle there, and got up and started across. There is a handle on the side of the coal car and a step there. The two cars were loaded with coal. He stood up straight. I could not see him jump down. I saw him as he went over the side. I don't know whether he fell or jumped. When he fell I was trying to get up on the other side of the car. I got on the car the same way he did only I did not fall. I do not know Mr. George was there before I was. There is a distance of about three feet between the main part of a coal car and the couplings. I could not tell whether plaintiff jumped or fell. I saw the cars as they passed by. They passed just about the time I got upon the little platform. I think there were two cars. The

time of night was between half past seven and eight o'clock; guess that was about two hours after sundown. The daylight was all gone. It was a light night. I guess there was nothing to prevent me from seeing the cars if I had looked. If I could see a man fifty feet I could see a car a great deal farther; suppose you could see a car 200 feet. There was a light hanging in the neighborhood of the public crossing, and two lights on the platform. I suppose you could see a car 200 feet distant in the direction of the public crossing at that time without any trouble. That is my judgment."

There was evidence on the part of the appellant that appellee had been drinking, and at the time was somewhat intoxicated. The evidence on the part of appellee was that he had been drinking but was not intoxicated. It does not appear that he was seriously affected at the time by drink. There was evidence, also, on the part of appellant to show that the steps leading from the freight platform on the east and west were made and used for the convenience of the employes, and others having business with the company. The buildings were in the center of a block of ground, or at least the public crossings were some distance away from the buildings, and the tracks were not in a street. The evidence of the brakeman was, that the car which struck appellee, as claimed, was in charge of one of them who was on top of the car, and the evidence of all the men in charge of the train was that "kicking" the cars was the ordinary and usual way at that place of setting them on the "house switch."

Upon the close of the evidence the defendant asked the court to give the jury the following instructions, to wit:

The court instructs the jury that there is not sufficient evidence before them to warrant a verdict for the plaintiff, and they should find the defendant not guilty.

Which instruction the court refused to give.

And, thereupon, the court gave to the jury on behalf of the plaintiff, the following instructions, to wit:

1. If the jury believe from the preponderance of the

evidence the defendant company held forth invitation, inducement or allurements to the public generally, to cross and re-cross its right of way at the point where the accident is alleged to have occurred, and it was so used by the public generally, and that the company knew this, then and in that event, a person so crossing at said point, would not be a trespasser on the defendant's right of way.

2. And, notwithstanding you may believe from the evidence that the plaintiff was a trespasser on defendant's right of way, and that his own want of ordinary care exposed him to the risk of injury, yet the defendant might not with impunity wantonly or recklessly injure him. And if you believe from the preponderance of the evidence that the defendant's servants were at the time, and just before the time of the alleged injury, in the charge and management of the cars in question, and you further find from the evidence that said servants were aware of the dangerous position of the plaintiff in time to have averted the injury by the use of ordinary care, or that said servant could have been aware of plaintiff's danger by the use of ordinary care in time to have averted the injury, and failed to use ordinary care to avert the danger, but wantonly and willfully permitted the car to strike and injure plaintiff in manner charged in the declaration, then you should find the defendant guilty, and assess plaintiff's damages at whatever sum you may think him entitled to, under the evidence, not exceeding \$6,000.

3. The court instructs the jury, that while a person is bound to use reasonable care to avoid injury, yet he is not held to the highest degree of care and prudence of which the human mind is capable, and to authorize a recovery for injury, he need not be wholly free from negligence, provided his negligence is but slight, and the other party be guilty of gross negligence, as defined in these instructions. And in this case, although the jury may believe from the evidence that the plaintiff was guilty of some slight negligence, yet if the jury further believe from the evidence that the plaintiff's negligence was but slight, and that the defendant's servants were guilty of gross negligence, as

explained in these instructions, and that the injuries complained of were caused thereby, then the plaintiff is entitled to recover.

APPELLANT'S BRIEF, GREEN & GILBERT, ATTORNEYS.

Where a person is traveling upon a railroad company's right of way, not for any purpose of business connected with the railroad, but for his own convenience as a footway, there is nothing to exempt him from the character of a trespasser further than the implied assent of the company, arising from a non-interference with a previous like practice by individuals; but because the railroad company did not see fit to enforce its rights and keep people off its premises, no right of way is thereby acquired. A railroad company is not bound to protect or to provide safeguards for persons so using its grounds for their own convenience. In such case a person must use extraordinary care before he can complain of the negligence of the company. *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *Wharton on Negligence*, Sec. 346; *Cooley on Torts*, p. 660; *Thompson on Negligence*, Vol. 1, p. 434; *The Aurora Branch Railroad Co. v. Grimes*, 13 Ill. 591; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *I. C. R. R. Co. v. Hammer*, 72 Ill. 350; *Blanchard v. L. S. and M. S. R. Co.*, 126 Ill. 422; *I. C. R. R. Co. v. Brookshire*, 3 Ill. App. 231; *Willard v. Swanson*, 126 Ill. 385; *Lake Shore and M. S. Ry. Co. v. Bodemer (Ill.)*, 29 N. E. Rep. 692.

APPELLEE'S BRIEF, KARRAKER & LINGLE, ATTORNEYS.

That making a running switch, or the "kicking in" process, which is the same thing as to effect and danger, at a speed of five miles an hour, in a populous city, constitutes a high degree of negligence, we cite *I. C. R. R. Co. v. Baches*, 55 Ill. 379; *C. & A. R. R. Co. v. Garvey*, 58 Ill. 83; *C. & N. W. Ry. Co. v. Taylor*, 69 Ill. 461.

We call the especial attention of the court to the case of *I. & St. L. R. R. Co. v. Galbreath*, 63 Ill. 439.

A railroad company is to be held to the exercise of a very high degree of care in operating its road through the public

I. C. R. R. Co. v. Beard.

streets of a city. C. B. & Q. R. R. Co. v. Stumps, 69 Ill. 409; Penn. Co. v. Hankey, 93 Ill. 580; L. S. & M. S. R. R. Co. v. Sunderland, 2 Brad. 307.

It is gross negligence for a railroad company to run its trains in the dark without a headlight. Burling v. I. C. R. R. Co., 85 Ill. 18.

The law of negligence is so well settled in this State by repeated rulings, that we can see no ground for dispute in an inquiry as to what it is. It is free from difficulty, as laid down in Willard v. Swansen, 126 Ill. 385, and in Lake Shore & M. S. Ry. Co. v. Bodemer, N. E. Reporter, Vol. 29, p. 692, cited by appellant. The last case we especially commend to the attention of the court. This case went to the jury upon the single count, charging such gross negligence as showed willfulness, and the plaintiff was considered a trespasser. The court quotes from Harlan v. Railway Co., 65 Mo. 22, where it is said: "In cases where plaintiff has been guilty of contributory negligence, the company is liable if, by the exercise of ordinary care, it could have prevented the accident. It is to be understood that it will be so liable, if, by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company fail to discover the danger, through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger, and averted the calamity."

"Contributory negligence," the court further say, "such as that of a trespasser upon a railroad track, can not be relied on in any case where the action of the defendant is wanton, willful, or reckless in the premises, and injury ensues as the result."

"Although the plaintiff is guilty of negligence, he can recover if the defendant could have avoided committing the injury, by the exercise of ordinary care." Deer. Neg. Sec. 30.

In Railroad Co. v. Harman's Adm'r, 83 Va. 553, 8 S. E. Rep., the rule was recognized that a railroad company is

bound to keep a reasonable lookout for trespassers on its tracks, and to exercise such care as the circumstances require, to avoid injury to them.

OPINION OF THE COURT, SAMPLE, J.

Under the evidence in this case and the law as applicable thereto, there was no public crossing at the place alleged in both counts of the declaration. This claim is based wholly on the physical fact, so far as the appellant is concerned, that it constructed steps at the east and west ends or sides of its freight house platform, which platform was elevated three or four feet from the level of the ground. The steps were essential to the use of the freight house by its employes and the public, with whom there it transacted business. The steps connected with no street, sidewalk or public way. The fact alone that the public used such steps in going to and from the freight and passenger depot, or for convenience used them to shorten the distance in going to and fro between the different portions of the town, did not make them a part of a public crossing.

The fact that appellant had a station there, with freight and passenger depot buildings, was an invitation to that part of the public having dealings with it, to cross its tracks wherever necessary for the purpose of transacting such business; but this fact did not make its tracks public crossings, in any proper sense of that term. If so, then the appellant was in the wrong in allowing its cars, over which appellee had to climb, to stand upon such public crossing. No one would insist it did not have a perfect legal right to allow these cars to stand where appellee found them, and over which he climbed. That act is not alleged in the declaration nor claimed in the argument to have been negligent, or a violation of law, state or municipal. It would have had just as clear a legal right to have had other cars standing opposite, to the west, on the "house" track, as the place where appellee fell. Its right there, of the use and occupancy of that portion of the ground, was exclusive, not only as to the public generally, but to the appellee as well.

Therefore there could be no correlative rights of use as between appellee and appellant. Necessarily, then, at the time of the accident, the appellee having no business with the company, was on that track without legal right to its use, to the exclusion of the appellant, for a single moment of time. His relation, therefore, to the appellant at the time and place of the injury, must have been that designated in *Blanchard v. L. S. & M. Ry. Co.*, 126 Ill., at p. 422, and other cases there cited.

The case of *I. C. R. R. Co. v. Hammer*, 72 Ill. 347, is cited by appellee's counsel as holding a contrary doctrine. The facts in that case are not stated so that the law there announced can be clearly applied to the facts in this case. In all that appears the person injured may have been at the place of the accident for the purpose of transacting business with the company, or where he had a right to be. While it is held in that case that the person injured was not a passenger, yet the law is declared to be, "notwithstanding this, he was required, being, as he was, in a known place of peril, to use a higher degree of care than if he had been in a place of supposed safety." If his rights at the place of the accident were correlative with the company's, though subordinate, as it is at public crossings, then, of course, the duty of care and watchfulness was, by the law, imposed on the company, and the doctrine of comparative negligence would apply.

This case, however, is cited with others in the case of *C., B. & Q. R. R. Co. v. Olson*, 12 Ill. App. p. 250, as sustaining the doctrine that "it is negligence for a person to walk upon the track of a railroad, whether laid in the street, or upon the open field, and he who deliberately does so, will be presumed to assume the risk of the perils he may encounter."

That law was quoted from the case of *I. C. R. R. Co. v. Hall*, 72 Ill. 225, decided at the same term as the *Hammer* case. In the latter case the proof was clear that the track had been in common use for pedestrians without complaint on the part of the company. The basis of the doctrine of the *Hall* case must be on the want of legal right to so use

the track and not in the mere fact that the person injured is walking along rather than across the track.

The fact that many persons use a track, either in passing along or across it, with the knowledge of the railroad company, without legal right, may have an important bearing on the question as to the character of the act of a railroad company in the operation of its trains resulting in an injury in this, that such an act might be mere negligence without such knowledge, for which there could be no recovery, but with such knowledge the same act might be so grossly negligent as to evince wantonness, indicating an utter disregard for life. Care and negligence are relative terms, dependent largely as to degree upon known conditions. To run a train at a high rate of speed where it was known persons were so using the track, although without legal right, might be wanton, for which wantonness, resulting in an injury, there could be a recovery: *L. S. & M. Ry. Co. v. Bodemer*, 139 Ill. 596; while if run at the same rate of speed, without such conditions being known, and an accident to a person occurred, there would be no liability.

Having determined that there was no public crossing at the place where the accident happened and that the rights there of the respective parties were not correlative but exclusive on the part of the appellant, the question left for determination is: Did the act of the servants of appellant under the conditions there existing in kicking back the car on the "house" track, which it is alleged struck the appellee, exhibit such a degree of recklessness as to indicate an utter disregard of consequence, or an intentional wrong?

It is said that "gross negligence" of itself, is not in law "a designed and intentional mischief, although it may be cogent evidence of such fact." *J. S. E. Ry. Co. v. Southworth*, 135 Ill. 255.

"Gross negligence" is not a term, which, grammatically at least, and apparently not in law, though frequently so applied, is the subject of comparison, as it would be absurd to say "*gross gross, grosser gross and grossest gross.*" *C. B. & Q. R. R. Co. v. Johnson, Adm'r*, 103 Ill. 522.

And yet it is said, in the case of L. S. & M. A. Ry. Co. v. Bodemer, 139 Ill. 606, quoting from 2 Thompson on Negligence, 1264, Sec. 53: "What degree of *negligence* the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things, is so dependent on the particular circumstances of each case as not to be susceptible of a general statement." It is defined by our Supreme Court in I. C. R. R. v. Godfrey, 71 Ill. 500, to be "*such* gross negligence as evidences willfulness." It is said in the Bodemer case, *supra*, to mean "*such* a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness. It is such gross negligence as to imply a disregard of consequences, or a willingness to inflict injury."

"Contributory negligence, such as that of a trespasser upon a railroad track, can not be relied on as a defense, in any case where the action of the defendant is wanton, willful or reckless in the premises, and injury ensues as a result." Bodemer case, *supra*, 607.

It is there further in substance said that the comparison of negligence, *in such case*, on the doctrine of contributory negligence, *must be understood*, when used in reference thereto, to apply to the care required, or the law of relation as to reciprocal duties, after a discovery by defendant of the danger in which the injured party stood, or to the *recklessness* and wantonness of the servants of the defendant in *failing* to make *such* discovery and avert the calamity.

Applying these rules of law to the facts in this case for the purpose of determining the question now under consideration, the servants of appellant were not primarily required to use care to discover the appellee at a place on the track where he had no legal right to be, unless they knew or had reasonable grounds to believe that he or some one would be there and in a situation or condition of peril; and unless they so knew, the appellant is not liable, unless the appellee was discovered by the servants of appellant to be at such place and in peril of injury and they thereafter did not use care—that is, make all reasonable efforts—to avoid injuring him.

There is no proof that appellant's servants saw the appellee on or near the track. The proof is clear that a brakeman rode the car back to the place where it was to be left and he did not see appellee. The appellee declared no one was on the car, but how could he be expected to see a man on the car when he did not, as he says, see the car itself.

Worthington declares he saw no one on the car, but there is no proof that he looked to see. There were no circumstances calling his attention to that fact.

Others who testified on the subject for the appellee were some distance away and do not pretend to any knowledge on the subject that can be considered as of any weight as evidence. The brakeman who rode the car and the man in charge of the bills of freight testify positively on the subject. Besides, all the circumstances corroborate them. Even if no one rode on the car the facts do not make such a case of wantonness or recklessness as to indicate a disposition to willfully inflict an injury. The proof is uncontradicted that kicking the car on the side track was the customary way, which the appellee testified he well knew. A part of the train was standing on the "pass" track, over which appellee climbed to reach the "house" track, where he was injured. No one would expect, and the train men had no reasonable grounds to believe, that a person would climb over the cars to reach that track, and thus place himself in a position of peril. Had he been seen on the coal car that was standing on the "pass" track, by the train men, they would have been under no obligation to have checked or stop the moving car. They would have had a legal right to have assumed that he was of ordinary intelligence and caution, and would not voluntarily and knowingly expose his body to danger. *C., R. I. & P. R. R. Co. v. Austin*, Adm'r, 69 Ill. 426; *I. C. R. R. Co. v. Fulka*, 9 Ill. App. 605.

This question of recklessness must be considered with reference to the specific facts and conditions as they then existed. It is not necessary or even proper to consider what might have happened to some other person at some other place on the track, by operating the car as was done in this case. The question is, so far as this appellee is con-

cerned, not that some one might have been attempting to cross the track from the west to the east, at a place where there were no cars standing on the "pass track," but could the trainmen reasonably anticipate that appellee or any other person would climb over the cars at that place for the purpose of crossing the track there. While there is proof that a good many people, as a matter of convenience, availed themselves of the steps of the freight house platform in passing to and fro, yet, there is no proof that they were in the habit of climbing over freight cars in order to do so. Conceding, then, that the moving of the car that is alleged to have struck appellee, by "kicking" it, was negligence, still it falls far short of that required to constitute wantonness on the part of the servants of appellant; unless their conduct was so reckless as to impart that character to the act, resulting in appellee's injury, there could in no event be a recovery in this case. That was essential to be established to relieve him of the obligation of care for his own safety; for under the doctrine of comparative negligence, slight negligence on his part is not inconsistent with the observation of ordinary care, which, when such rule is invoked and made the basis of an action, must be proven, in order to authorize a recovery. *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 75-83; *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512.

In fact, the law of comparative negligence has no application, unless the person injured has used at least ordinary care. *P. C. & St. L. Ry. Co. v. Goss*, 13 Ill. App. 619.

From what has been heretofore said it is apparent that our conclusion is that the appellee did not exercise ordinary care for his own safety.

There was a light hanging near the public crossing, and two lights on the platform of the depot building, so that the moving car could have been seen some distance away. The appellee was in an elevated position on the coal car, with no obstruction to prevent him from seeing the car. He testifies that he knew that switching was done there by "kicking" the cars on the "house track" at all times, day and night, and that the engine was disconnected from the train, and was down by the switch ends at the south, evi-

dently engaged in that work. Knowing these facts, which fully apprised him of the danger, he hazarded the attempt to cross the "house" track, which was known to him to be the switch track, and in doing so, jumped down from the coal car, which was standing on the "pass" track, and fell, but says, "I was not down more than a second." As he attempted to arise, he claims the car struck him in the chest and knocked him down on his back.

By his own showing he must have jumped down from the coal car almost immediately in front of the moving car, although he could have seen the car and avoided the accident.

Where a person voluntarily and unnecessarily places himself in a position well known to be a place of danger, and is injured, there can be no recovery for even gross negligence on the part of the defendant, the act of the defendant not being willful or wanton. *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202.

Instructions number one, two and three, given for the appellee, were not in harmony with the views herein expressed, upon which we do not deem it necessary to comment further, for the reason that if we are correct, there can be no recovery in this case, and therefore the case is reversed and not remanded.

Finding of facts: That appellee attempted to cross the track of appellant at a place that was not a public or private crossing, without using ordinary care on his part, to see an approaching car that was being at the time switched onto one of appellant's tracks by "kicking" the same, and giving it momentum in that manner, which car struck the plaintiff and injured him; that said car was at the time attended by a brakeman riding on top of the same, for the purpose of controlling and stopping it at the desired place on the switch track, and that the act of so operating such car, under the circumstances, was not so negligent as to manifest a reckless disregard of the rights or safety of the appellee.

The clerk will enter the foregoing in, and make the same a part of, the final order of the case.

Spain et al. v. Thomas.

1. *Practice in Appellate Court—Abstract Not in Compliance with the Rules of Court.*—The following, purporting to be an abstract of the record viz.:

“ABSTRACT OF RECORD.

Page.

1. Placita. Praecipe.
2. Summons, service and return.
- 3-6. Declaration in assumpsit.
7. Motion to rule plaintiff to a bond for costs.
8. Bond for costs.
9. Plea of Statute of Limitations.
10. Replication to plea.
11. Demurrer to replication.
12. Answer to demurrer.
- 13-14. Bill of exceptions.
- 17-19. Appeal bond duly approved.
20. Orders of court and judgment.
- 21-22. Copy of order book.
23. Assignment of error.
25. Certificate of Clerk of County Court.”

Was held to be a mere index and not to be regarded as an abstract of the record in any sense as required by the rules of the court.

2. *Rules of Court—Waiver.*—The Appellate Court has no right to waive the enforcement of its rules, as a matter of favor, in any case, without granting the same indulgence in other cases, and thus suspend their operation altogether.

3. *Rules of Court—Force and Effect.*—The rules of court, when established, have the force of law. They are obligatory upon the court itself, as well as upon parties, and must be administered according to their terms while they remain in force.

4. *Trial by the Court—Holdings—Exceptions—Questions of Law.*—Where a case is tried by the court below without a jury, and no motion for a new trial made, or propositions of law submitted to or passed upon by the trial court, the Appellate Court can not pass upon questions of law or fact involved in the controversy.

5. *Bill of Exceptions—Statement that it Contains all the Evidence, etc.—Questions of Fact.*—Where, in an action upon a promissory note, the bill of exceptions contained the following statement, viz., “The foregoing was all the evidence introduced, except the note which was in evidence on the trial of the cause,” it was held to be insufficient, as it showed upon its face that it did not contain material evidence which was introduced upon the trial.

6. *Appeals—Court Can Look Only to the Bill of Exceptions.*—In an

action upon a promissory note, where the judgment is appealed from, and the bill of exceptions does not contain a copy of the note introduced upon the trial, *it was held* that this deficiency in the bill of exceptions can not be supplied by the declaration or the copy of the note attached thereto. The court can look to the bill of exceptions, and to that only, for the evidence.

Memorandum.—Action on a promissory note. Appeal from the County Court of Richland County; the Hon. T. A. FRITCHEY, County Judge, presiding. Heard in this court at the February term, A. D. 1893, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

McCAULEY & ROWLAND and DAILEY & MORRIS, attorneys for appellants.

J. I. MOUTRAY and T. W. HUTCHINSON, attorneys for appellee.

OPINION OF THE COURT, SCOFIELD, J.

The twenty-first rule of this court, which provides for the filing of abstracts, seems to have been disregarded in the present case. For this reason we are under the necessity of affirming the judgment of the court below, under the twenty-sixth rule, which provides that if abstracts are not filed within a certain time the judgment or decree of the lower court shall be affirmed. What is named, or, rather is misnamed, "abstract of record," is no more than a general index, referring to pages three to six of the record for the declaration, to page nine for the plea and to pages thirteen and fourteen for the bill of exceptions. Under numerous decisions of the Appellate Courts, this index can not be regarded as an abstract of the record, and the judgment of the court below must be affirmed on the ground that no proper abstracts have been filed. *Lake v. Lower et al.*, 30 Ill. App. 500; *Allison et al. v. Allison*, 34 id. 385; *Florez v. Brown*, 37 id. 270.

We have no right to waive the enforcement of these rules as a matter of favor in any case without granting the same indulgence in other cases, and thus effectually suspend-

ing the operation of the rules altogether. The Supreme Court in *Lancaster et al. v. The W. & S. W. Ry. Co.*, 132 Ill. 492, hold that such rules, when established, have the force of law, and are obligatory upon the court itself, as well as upon the parties, and must be administered according to their terms while they remain in force. This being true, our duty in this case does not admit of debate; and yet we have taken the pains to examine the record carefully to ascertain the merits or demerits of this appeal. The case was tried by the court below without a jury and no motion for a new trial was made, neither was any proposition of law submitted to, or passed upon, by the court. The only exception preserved in the record is to the decision of the court in rendering judgment for the appellee. The bill of exceptions contains the following statement: "The foregoing was all the evidence introduced except the note which was in evidence on the trial of this cause." Neither the note nor the substance of it is set forth in the bill of exceptions, nor is the time when the same became due stated either directly or indirectly. The defense was the statute of limitations, but for aught that appears to the contrary, the note may not have become due till the day before the action thereon was commenced, and may have been received as evidence of indebtedness under the common counts. This insufficiency of the bill of exceptions can not be supplied by the declaration or the copy of the note attached thereto. This court can look to the bill of exceptions, and to that only, for the evidence. No proposition of law having been held or refused by the court below, and the bill of exceptions showing upon its face that it does not contain material evidence which was introduced at the trial, there is no question of law or fact properly presented for our determination. The judgment will be affirmed.

**The Knights Templar and Masons' Life Indemnity Co.
v. Gravett et al.**

1. *Misjoinder of Parties Plaintiff.*—Where a person brought a joint action of trespass on the case, to recover damages against an insurance company for an alleged fraudulent declaration of forfeiture of a policy of insurance on his life in his own name, and that of his wife, the beneficiary named in the policy, *it was held*, that there was a misjoinder of parties plaintiff, and a judgment recovered by them was reversed.

2. *Non-suit—Misjoinder of Plaintiffs.*—The joinder of too many plaintiffs in an action *ex delicto*, is ground for a non-suit on the trial. In this respect actions on contracts and for torts are alike.

3. *Husband and Wife—Misjoinder as Parties Plaintiff.*—Where a husband and wife sued jointly to recover damages for an alleged injury to the person of the wife, *it was held*, that the husband was improperly joined with the wife as a co-plaintiff in the action.

4. *Life Insurance—Right of Action in the Name of Beneficiaries.*—Where a person insured his life for the benefit of his wife, naming her in the policy as the beneficiary, and the policy contained a condition that any member having designated his beneficiary might change the same at his pleasure without notice to or consent of the beneficiary, and that all persons accepting any interest in the policy or company did so upon these express terms, *it was held* in an action to recover damages for an alleged declaration of forfeiture of the policy, that the wife had no present right of action, either to recover the premiums paid by her husband because they were not paid for her use, or to recover damages for being deprived of an expectancy, because she might be deprived of that by the act of her husband in appointing another beneficiary.

Memorandum.—Trespass on the case. Appeal from the Circuit Court of White County; the Hon. EDMUND D. YOUNGBLOOD, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, T. P. DAVIS AND C. S. CONGER,
ATTORNEYS.

There is clearly no joint right of action upon the part of appellees; their right to recover damages, if they have any, is several, and not joint.

In the case of Universal Life Insurance Co. v. Cogbill et

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al., 30 Gratt. (Va.) 72, where the company had become insolvent, the husbands who had taken out policies upon their own lives, but for the benefit of their wives, filed a bill to recover out of certain bonds, which had been deposited by the company in the state treasury. The company raised the question that the wives ought to have been made co-plaintiffs with their husbands. The court, however, was of the opinion that this was no good ground of demurrer, saying, "in this demand their wives had no interest. Indeed, the wives of these parties had, under the contract of insurance, no claim or demand upon the company, until after the death of the insured." And after quoting the language of the policy the court proceeds as follows: "The premiums under this contract were to be paid, and were actually paid, in each case, by the assured, and he alone had a right to demand re-payment. The wife could make no demand against the company till after the death of the husband, and she was, therefore, neither a necessary nor proper party."

In case of *Abell v. Penn Mutual Life Ins. Co.*, 18 W. Va. 400, where a similar question was raised, it is said by the court: "The plaintiff in such action should be the person who, under the provisions of the policy, paid the premiums, though by the policy the amounts assured were to be paid on the death of the assured, to a third party."

The action in this case being for a tort, must be brought by the person whose legal right has been invaded, and none can join but those who are jointly entitled to recover. Parties having several and distinct interests can not join. *Chitty on Pleading*, Vol. 1, page 60, *et seq.*

"If this objection of too many plaintiffs appear on the record, advantage may be taken of it, either by demurrer, in arrest of judgment, or by writ of error, or if the objection do not appear on the face of the pleadings, it would be ground of non-suit on the trial." *Ibid.*, page 66.

APPELLEES' BRIEF, ORGAN & ORGAN, ATTORNEYS.

We think that when the cause would survive to the wife

it does not make any difference; see Dicey on Parties, 414. That this cause would so survive to the wife, see Starr & Curtis Stat., p. 247, par. 123. The misjoinder of plaintiff leads only to increased costs. Dicey on Parties, 532; C. I. P. Act, 1860, § 19, 526, side page 504; Dicey on Parties.

OPINION OF THE COURT, SCOFIELD, J.

William Gravett, one of the appellees, sued appellant in the Circuit Court of White County, in an action of trespass on the case to recover damages for an alleged fraudulent declaration of forfeiture of a policy of insurance on his life, which was payable to Ellen Gravett, his wife, and his children or heirs in the order named. Upon the trial, appellant objected to the introduction of the policy in evidence, upon the ground that it showed no cause of action in William Gravett, whereupon the latter asked and obtained leave, against appellant's objection, to amend his declaration by making his wife, Ellen, a plaintiff with him in the action. When the policy was offered in evidence, under the amended declaration, appellant objected, alleging that William and Ellen Gravett had no joint right of action; and when the court overruled the objection, appellant duly excepted to the ruling of the court. The jury returned a verdict for appellees, and the court rendered judgment on the verdict. The question of a misjoinder of parties was again presented, on the motion for a new trial, and was renewed on the motion in arrest of judgment, and is the principal question before us for consideration. Long ago it was held by the Supreme Court of this State, that the joinder of too many plaintiffs in an action *ex delicto*, is ground for non-suit on the trial. In this respect, actions on contracts and for torts are alike. *Murphy et al. v. Orr*, 32 Ill. 489.

In *The City of Chicago v. Speer et al.*, 66 Ill. 154, the husband and wife sued jointly to recover damages for an alleged injury to the person of the wife. It was held that the husband was improperly joined with the wife as a co-plaintiff in the action, and the judgment in favor of the

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two was reversed on that ground. To the same effect are the cases of *Hennies et al. v. Vogel et al.*, 66 Ill. 401, and *Harris v. Brain et al.*, 33 Ill. App. 510. In the case before us, the policy is payable to "Ellen Gravett, wife, the children, or heirs of said member, and in the order named, unless otherwise ordered by the member in his application, or, if he chooses, subsequently by will, or otherwise." The policy provides that the constitution printed on the back thereof shall be a part of the contract. Sec. 6 of Art. VII of this constitution is as follows: "Any member having designated his beneficiary or beneficiaries, may change the same at his pleasure, without notice to, or consent of, the beneficiary or beneficiaries, and all accepting any interest in this policy or company do so upon these express terms." Now, if Ellen Gravett has any present right of action, it must be either to recover the premiums paid by her husband, or by his sons, for him, or to recover damages for being deprived of an expectancy, of which she might also be deprived by death or by the act of her husband. She can not recover the premiums, for they were not payments made specifically for her use, but for the purpose of securing a benefit for her under the policy at the time of her husband's death in case he should not exercise his power to appoint another beneficiary. The clause of the policy which fixes the amount payable at William Gravett's death at \$5,000, and all the money paid on the policy in assessments, was not intended to give Ellen Gravett the right to the specific moneys paid as premiums, but merely to state the rule for the ascertainment of the amount to be paid the beneficiary, when the policy should become due. Nor can Ellen Gravett be permitted to recover for being deprived of an expectancy, for there is no conceivable rule by which her damages for such deprivation can be estimated. If she should outlive her husband, and if he should not appoint another beneficiary, and if he should continue to pay his assessments, she would be entitled to a certain sum of money at the time of his death. The case is altogether too hypothetical to authorize a present recovery of damages. But

even if Ellen Gravett has a present right of action, she can not sue with her husband, inasmuch as the measure of their damages can not be the same in any view of the case, and a joint judgment can not be rendered in their favor. For the error arising from the misjoinder of plaintiffs, the judgment is reversed, and the cause remanded.

State Bank of Tonawanda v. Dawson, Sheriff.

1. *Exceptions—Record.*—A record which contains no proper exceptions presents no question for the consideration of an appellate court.

Memorandum.—Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the February term, A. D. 1893, and affirmed. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

MILLS & FLITCRAFT and MESSICK & RHOADS, attorneys for appellant.

L. H. HITE and ST. CLAIR L. HITE, attorneys for appellee.

OPINION OF THE COURT, SCOFIELD, J.

The bill of exceptions, in this case, is verily a bill without exceptions. Parts of certain depositions were objected to, but the objections were taken under advisement till the conclusion of the trial, which was before the court, without a jury, and no decision of the court was ever announced on the subject. No exception was ever taken with reference thereto. It is also true that no proposition of law was held or refused, no motion for a new trial was made, no exception was taken to the findings or judgment of the court. The motion for a new trial and exception to the action of the court in overruling the same, which appear in the judgment, as copied by the clerk from the judgment record, are not properly a

Terhune v. Hill.

part of the record, and can not become such except by being embodied in the bill of exceptions. If repeated adjudication can settle any proposition whatever, it is settled beyond controversy that a record which contains no proper exceptions presents no question for the consideration of an appellate court. The citation of authorities in support of this proposition is wholly unnecessary.

The judgment will be affirmed.

Terhune v. Hill.

1. *Record in the Appellate Court—Sufficiency of Clerk's Certificate.*—Where a clerk's certificate does not show that the record filed contains any order or judgment of the court below, but only that it contains "all the papers designated, numbering from 1 to 52," *it was held* that the judgment and the order allowing an appeal are records and not papers; therefore, under the clerk's certificate, there was no judgment before the court for review.

2. *Records—Fatal Defects.*—Where a record has fatal defects in not showing that the appeal was granted upon one of the days of the term of court from which it was taken, the appeal will be dismissed.

Memorandum.—Appeal from the County Court of Franklin County; the Hon. R. H. FLANNIGAN, County Judge, presiding. Heard in this court at the February term, A. D. 1893, and dismissed. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

W. H. HART, attorney for appellant.

JOHN A. TREECE, attorney for appellee.

OPINION OF THE COURT, SCOFIELD, J.

The clerk does not certify that the record filed in this case contains any order or judgment of the court below, but only that the record contains "all the papers desig-

nated, numbering from one to fifty-two." The judgment and order allowing an appeal are records, not papers; therefore, under the clerk's certificate, there is no judgment before us for review, neither has any appeal been taken to this court. It may be observed also that what purports to be an order allowing an appeal to this court, does not appear to have been made by the court below in term time. The case was tried on August 19th, and the memorandum concerning the judgment, which is hardly a judgment in form, seems to have been made on the same day. Afterward, on August 23d, an appeal was allowed. The record is fatally defective in not showing that the appeal was granted on one of the days of a term of the County Court.

The appeal is dismissed.

Hanford v. Hagler.

1. *Rules of Court—Advance Docket Fees.*—Under a rule of the Circuit Court providing that "whenever the appellant neglects to have the case docketed, the appellee may do so and obtain an order upon the appellant to pay the costs necessarily advanced, and upon failure to comply with the same, the appeal may be dismissed," it is error to require more than the fees fixed by law for costs necessarily advanced, for services performed, or to be performed, in the docketing of the case.

2. *Dismissal of Appeal for Non-compliance with the Rules of the Court.*—Under a rule of the Circuit Court, providing that whenever the appellant neglects to have the case docketed, the appellee may do so, and obtain an order upon the appellant to refund the costs necessarily advanced by him in so doing, *it was held*, that the rule covers only such costs as may be necessarily advanced. This necessity is not one which arises from the compulsion of the clerk, or from long continuing acquiescence of attorneys and their clients, or from the order of the court requiring the payment of illegal fees. It is necessary to advance none but legal fees. The appellant has the right to refuse to pay any fees except those legally chargeable, and his appeal can not be dismissed for such refusal.

Memorandum.—Appeal from the Circuit Court of Jackson County, the Hon. JOSEPH P. ROBARTS, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893. Opinion filed September 8, 1893.

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The statement of facts is contained in the opinion of the court.

WM. A. SCHWARTZ, attorney for appellant.

SMITH, McELVAIN & HERBERT, attorneys for appellee.

OPINION OF THE COURT, SCOFIELD, J.

Hagler, the appellee, recovered a judgment against Hanford, the appellant, for \$199.41 before a justice of the peace of Jackson County. From this judgment an appeal was taken to the Circuit Court by the filing of a bond with the justice on November 22, 1892. It seems that the case was docketed and set for trial prior to the commencement of the ensuing January term of the Circuit Court. However that may be, on Monday, the first day of the January term, the appellee obtained a rule on appellant "to repay docket fee of \$2.35," by the following Wednesday morning. Such payment not having been made, the appeal was dismissed on Wednesday morning for non-compliance with the rule. According to the admission of appellee's brief, this was before the case was subject to be called for trial. On the Saturday following, being one of the days of the January term, appellant made his motion to set aside the order of dismissal, and filed in support thereof his own affidavit and that of his attorney. A counter-affidavit, made by the clerk, was filed on behalf of appellee. Thereupon the motion to set aside the order of dismissal was overruled, and an appeal was prayed for and perfected to this court. Appellant states in his affidavit that he has a meritorious defense to the whole of plaintiff's demand, except six or, at most, twelve dollars thereof; that several days before the commencement of the January term of the Circuit Court, his attorney, W. A. Schwartz, notified him that the case was docketed and set for trial; that he was at court ready for trial, and did not know that there was any demand against him for docket fees, and did not know until Saturday after the appeal had been dismissed, that a rule had been made requiring him to pay docket fees, or that the appeal had been dismissed for non-compliance with the rule.

Appellant offers in his affidavit to pay the docket fee, and avers that he would have paid it at once, had he been notified of the rule, and states that his affidavit is not made for delay, but that justice may be done.

W. A. Schwartz, in his affidavit states that he was attorney for Hanford in the case in question and that the case was regularly on the clerk's docket and set for trial several days prior to the commencement of the January term; that he was in "regular attendance" during the term and had no notice or intimation of the rule aforesaid or of the order dismissing the appeal until the Saturday following; that he had been waiting for the case to be called for trial and that if he had known of the making of the rule he would have caused the same to be complied with. The clerk's affidavit is as follows: "The docket fee in the above styled cause was paid by appellee, Izri Hagler, the appellant, Hanford, not having paid same—not having been notified to pay same by me." Certain rules of the Jackson Circuit Court are referred to by appellee as a justification of the action of that court in dismissing the appeal. These rules are as follows: "1. All appeals perfected either before the lower court or clerk of this court ten days before the first day of the term, where service, when required by law, has been had upon appellee, or his appearance has been entered ten days before the first day of the term, shall stand for trial at such term; all other appeals shall stand continued generally unless tried by consent. 2. Whenever the appellant neglects to have the case docketed, the appellee may do so and obtain an order upon the appellant to pay the costs necessarily advanced; and upon a failure to comply with the same the appeal may be dismissed." It will be observed that the language of the rule covers only such costs as may be *necessarily advanced*. This necessity is not one which arises from the compulsion of the clerk, or from the long-continued acquiescence of attorneys and their clients, or from an order of court requiring the payment of illegal fees. It is necessary to advance none but legal fees.

The appellant has the right to refuse to pay any fees

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except those legally chargeable, and his appeal could not be dismissed for such refusal. The record before us shows that the order was to "repay docket fee of \$2.35." This language indicates some specific fee for the docketing of the case. Referring to the statutes, we find that in counties of the first class, which includes the county of Jackson, the fee for docketing a case is twenty cents. The total amount of the justice's fees, including fifty cents for the transcript, is but \$1.75. If this be added to the twenty cents allowed for docketing the case, the amount is less than the sum specified in the order as "docket fee." Appellee's counsel virtually admit that the docket fee of \$2.35 was exorbitant. Though they do not hesitate to speak *dehors* the record on other points, they do not attempt to justify this charge, even by going outside of the record. They say: "All we desire to say in reference to this point, is, that error can not be assigned on this matter, even if the fee is too much, because no holding of the Circuit Court was had on that point, on trial of this matter." Here counsel are in error. The fee being illegal, appellant was under no obligation to pay it. For failing to pay an illegal fee, without notice of the order requiring its payment, his appeal was dismissed before the day on which the case was set for trial. As soon as he learned of the action of the court, and at the same term, he made a motion to have the order of dismissal set aside, and even offered to pay the docket fee, that he might have a trial of the case on the merits. The court overruled the motion, and appellant excepted. The question is properly before us for our determination. We think the court erred in overruling the motion to set aside the order dismissing appellant's appeal.

The judgment will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

APPELLATE COURTS OF ILLINOIS.

Reed v. Rich.

Reed v. Rich.

ts—Principal—When Bound—Ratification.—In order that a may be bound, a tort (e. g. a trespass) must, at the time when d, have been intended to be done on behalf, and for the benefit incipal, or, as it is sometimes expressed, in the name of and for the benefit of the principal.

ts—Ratification and Adoption.—An action will lie against son who has ratified and adopted an act of imprisonment, or ordered by his servant or agent, for his use and benefit, the imprisonment was effected, in the first instant, without his e.

spass—Ratification.—A person who agrees to a trespass after ritted, is, in law, not a trespasser, unless the trespass was done se or for his benefit, and then the agreement, subsequently ounts to a precedent command.

ts—Subsequent Approval of a Wrong Act.—The approval of a act, already committed, is no subject of punishment. Subse-roval of a trespass will not affect a third person, unless the done in his name and for his use. If the trespass was done e or benefit, or if he is not in a situation to have intended the his subsequent assent does not make him a trespasser.

re the owner of certain lands is benefited in common with other f adjoining lands by the wrongful construction of a ditch, truction will not create a liability against such owner, where o pretense that the ditch was constructed by his direction, or uest, or for his benefit.

ification—What Is, and What Is Not.—Where a ditch, which a number of land owners in common, was wrongfully con-and the person who constructed the same did so without the e of one of the land owners so benefited, and afterward n said land owner, upon two different occasions, and asked for r digging the ditch, and was refused, and more than a year , called the third time upon such owner for money, and was 1 dollars, it was held that this act of the land owner, in the ence of any knowledge upon his part of the intended digging ch, and where it was not done in his name, or for his benefit, such a ratification of the act of digging the ditch as would ability on the part of said land owner for the damage done by

lence—Acts Having no Reference to the Subject-matter of the imissible.—On the trial of an action based upon the wrongful f a ditch, it is not error to exclude evidence of matter which erence to the subject-matter of the complaint in the declara-has reference only to some contemplated act in the future.

Reed v. Rich.

8. *Evidence—Refusal to Admit Competent Evidence Not Necessarily Reversible Error.*—The refusal to admit evidence which is competent, where the same matter has been proven by other witnesses, without objection, and is substantially before the jury, is not, necessarily, error, for which judgment should be reversed.

9. *Erroneous Instructions Not Always Reversible Error.*—Where a verdict is clearly in accordance with the evidence in the case, and it is apparent that justice has not been affected by the giving of an erroneous instruction, such error will not require a reversal of the judgment.

Memorandum.—Trespass for wrongfully cutting a ditch. Appeal from a judgment rendered by the Circuit Court of Union County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the August term, A. D. 1892, and affirmed. Opinion filed September 8, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, LEEK, DODD & KARRAKER, ATTORNEYS.

The evidence in this case shows that Scaggs dug the ditch to drain the land of Rich and others, and that the ditch did drain Rich's land, and that in February, 1888, he paid Scaggs five dollars for the work.

Cooley on Torts, 127, lays down the law as stated by Chief Justice Tindall, as follows: That an act for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. See 6 Wait's Actions and Defenses, 48-49, Sec. 9.

When a person does a thing for another without previous engagement or authority from the other, it becomes the act of the latter, if ratified by him, and he will be responsible for all the consequences which follow, to the same extent that he would have been if the act had been done by his express direction. 2 Addison on Torts, Wood's Ed., Sec. 833; Grund v. Van Vleck, 69 Ill. 478; Pardridge v. Brady, 7 Brad. 639; Arasmith v. Temple, 11 Brad. 39.

A. N. SESSIONS and GREEN & GILBERT, attorneys for appellee.

ILLATE COURTS OF ILLINOIS.

Reed v. Rich.

COURT, PHILLIPS, P. J.

ntiff, was the owner of certain lands in
nd appellee, the defendant, owned other
level of which was higher than the lands
ween the lands of plaintiff and the lands of
re was a natural ridge composed largely of

On the lower ground, not far from plaint-
ke known as Kimball Lake, which was on
he ridge, and on the east side of the ridge
veral lakes connected with each other and
derable quantity of water. The level of the
side of the ridge, as testified by witnesses,
welve feet above the level of the water in
n 1857, one Scaggs cut a ditch through the
man, across the ridge, about two feet wide
feet deep, through which the water com-
nd soon wore out a channel that practically

water from the east side of this ridge into
rich caused Kimball Lake to overflow its
l plaintiff's land. There were numerous
ie east side of the ridge whose lands were
ly benefited by reason of the cutting of said
e body of land owned by defendant was
by reason of the construction of such ditch.
ing so flooded by reason of the construc-
he brought his action against defendant for
trial a verdict and judgment for defendant
the plaintiff brings the record to this court
rous errors.

lence in this record to show that the de-
hing to do with the cutting of the ditch, or
nless from mere rumor, that some men
ng the opening of the ditch, and plaintiff's
he theory of the liability of the defendant,
ged ratification of the act. "In order that
be bound, the tort, *e. g.* trespass, must, at
A committed it, have been intended to
and for the benefit of B, or, as it is some-

times expressed, in the name and avowedly in behalf of B.”

“He that reviseth a trespasser, and agreeth to a trespass after it is done, or for his benefit, then his agreement subsequent amounteth to a precedent commandment.” (Dicey on Parties of Action.)

It is said in Addison on Torts, Sec. 833: “An action will lie against every person who has ratified and adopted an act of imprisonment, effected or ordered by his servant, or agent, for his use and benefit, although the imprisonment was effected, in the first instance, without his knowledge. But he that agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment. An imprisonment of a person liable to a railway company, having paid his fare, is an act for the benefit of the company, which may be ratified for the benefit of the company.”

In *Grund et al. v. Van Vleck*, 69 Ill. 478, where the action was for trespass, and the claim against two of the defendants was that they had ratified the act, it was held: “There is no pretense that they were concerned in the commission of the alleged wrongful acts. The only claim for their liability is that they approved and sanctioned acts after they had been done. The approval of a wrongful act already committed is no subject of punishment. Subsequent approval of a trespass will not affect a third person unless the acts were originally done in his name or for his use.” To make the subsequent ratification equivalent to a precedent commandment the act of trespass must have been committed in the name and avowedly on behalf of the party subsequently ratifying it. If the trespass was not done for his use or benefit, or he is not in the situation to have originally commanded the act, then his subsequent assent does not make him a trespasser. *Wilson v. Barker*, 4 Brad. 616; *Nicholl v. Glennis*, M. & S. 592.

There being many different land owners owning lands that were benefited by the construction of this ditch, any of whom may have planned it, the fact that the lands of

this defendant were benefited by its construction would not create a liability against him, and there is no pretense in the evidence that it was done by his direction or at his request. On the contrary, it appears that he was unacquainted with the man who did the work and had no knowledge of his purpose of so doing, and there is nothing in the evidence to show that it was done in his name or done for his benefit.

The evidence further shows that the men who dug the ditch did not know the defendant until some time after the ditch was dug, and his first connection with it, so far as this evidence is concerned, was when the man Scaggs came to him and said on two different occasions, that he had dug that ditch and asked defendant to give him some money, which was refused by the defendant, and more than a year after the digging of the ditch, the third time Scaggs approached the defendant, asked him if he would not give him some money, claiming that other land owners had done so, and the defendant handed him \$5. It can not be said that this act of the defendant, in the entire absence of any knowledge upon his part of the intended digging of the ditch, and where it was not done in his name or for his benefit, was a ratification of the act that would create a liability, and the evidence clearly warranted the jury in finding the defendant not guilty, although the digging of the ditch was prejudicial to the plaintiff and in violation of his right. It is further insisted that the court erred in excluding the evidence of Charles Corzino. Charles Corzino testified that he knew defendant and saw him last fall. He spoke of the Goodman ditch and that he was going to have it opened; that he had money and would spend it or have the ditch opened. The motion was made by counsel for the defendant to strike out testimony of Charles Corzino, as not relevant to the case, which motion was sustained. The action in this case is for the injury committed by opening this ditch in 1887 or 1888, and the time of which the witness, Charles Corzino, was speaking as having conversation with defendant was in the fall of 1891, and could not have had refer-

ence to the subject-matter of the complaint in plaintiff's declaration, but only reference to some contemplated act in the future; therefore it was not error to exclude this evidence.

It is urged further that the court erred in refusing to admit proper evidence offered by plaintiff. Plaintiff called and had sworn William Kratzinger and offered to prove by him that William C. Rich, Sr., was foreman of the grand jury at the March term of the Circuit Court of Union County, A. D. 1889, and that in the jury room, while the jury was in session, Wm. C. Rich, Sr., said in the presence of William Kratzinger and other jurors, concerning the investigation for the unlawful cutting of the Goodman ditch, and the destruction of the public road, that "there is nothing in it. That that ditch was cut by parties chipping in, and that he (Rich) was one of the parties who chipped in." Whereupon witness declined to answer for the reason that the matter was a privileged question, and counsel for defendant also objected.

The court sustained the objection, to which the plaintiff excepted. We are of the opinion that this evidence was admissible, but the same evidence substantially, was before the jury by the testimony of Geo. W. Curzino, who testified without objection, to substantially the same facts that were proposed to be proved by Kratzinger, and who was one of the grand jurors, and who testified that what Rich said was something like this: "that he did not think it worth while to take the trouble to look after that thing as it would not amount to anything, and he did not think there could be anything made out of it against Bob Goodman for the digging of the ditch, for it was a chipped-in arrangement, and he chipped with the balance; that I think was about the words." That the exclusion of the evidence offered was not error for which this judgment should be reversed. It is urged that the court erred in modifying instructions asked by plaintiff. We have carefully examined this record and there is nothing in the record to show wherein the modification was made, nor can it from the

record be determined that the court inserted any clause in any instruction.

It is insisted that the court erred in refusing plaintiff's ninth instruction, which was on the theory that if Scaggs cut the ditch for the purpose of benefiting the lands of the defendant and other persons in the vicinity of the ditch, by turning the surface and other waters from said land, and that Rich afterward paid him money for the digging of the same, and that in such case said conduct of the defendant in paying him money would be ratification by defendant of the act of Scaggs in digging the ditch, and make him liable therefor to the same extent as if he originally authorized Scaggs to dig the ditch, there being no connection whatever between Scaggs and defendant before the digging of the ditch, and there being other persons in the vicinity of the ditch whose lands would be benefited alike with the land of the defendant by the act of Scaggs, if some other land owner induced Scaggs to act, or he was acting for himself in digging the ditch, however beneficiary to the defendant such digging might be, it would not make him liable, and he can not be said to have ratified the act by the mere fact that on the frequent solicitations of Scaggs, with whom he had no previous connection, he thereafter gave him \$5. That it was not error to refuse the ninth instruction in the form it was asked.

It is insisted there was error in giving the twelfth, thirteenth, fourteenth, fifteenth and sixteenth instructions for the defendant. The twelfth instruction was that unless the jury should believe that the defendant caused the ditch to be dug or that it was dug avowedly in his interest and behalf, they should find the defendant not guilty. The thirteenth instruction stated that even though the defendant might have been incidentally benefited by the digging of the ditch, that fact would not of itself show ratification. Unless the ditch was dug in the interest of defendant or by his instigation, he could not be found guilty on any evidence appearing in this record. It was not error to give the twelfth instruction nor was the fact of his being incident-

Burlison v. Roberts.

ally benefited, evidence to show ratification of the act of Scaggs. It was not error to give the thirteenth instruction. The fourteenth and fifteenth instructions given for the defendant were erroneous in taking away from the jury the right to find a ratification, and making the case depend on whether the defendant advised and encouraged the digging of the ditch. The verdict, however, was clearly in accordance with the evidence in this case, and justice has not been affected by the error in instructions. The error in giving the fourteenth and fifteenth instructions should not require a reversal of this judgment. *Strohm v. Hayes*, 79 Ill. 41; *Murray et al. v. Haverly et al.*, 70 Ill. 319; *Caveny v. Weiller*, 90 Ill. 158.

The verdict of the jury under the evidence could not have been different from what it was. There is no sufficient ground for a reversal in this record. The judgment is affirmed.

Burlison v. Roberts.

1. *Bill of Exceptions to Contain Rulings, etc.*—The rulings of the trial court in giving or refusing instructions can not be reviewed in the Appellate Court unless the instructions, together with the rulings and proper exceptions, are preserved in a bill of exceptions.

Memorandum.—Appeal from the County Court of Franklin County; the Hon. R. H. FLANNIGAN, Judge, presiding. Heard in this court at the February term, 1893, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

W. H. WILLIAMS, attorney for appellant.

S. E. FLANNIGAN and C. H. LAYMAN, attorneys for appellee.

OPINION OF THE COURT, SCOFIELD, J.

This is an appeal from a judgment of the County Court of

Franklin County, in favor of appellee and against appellant, for \$37.50, for labor performed, and \$17.50 for attorney's fees for services rendered on the trial of the cause. The bill of exceptions contains neither instructions, nor motion for a new trial. It is true that a motion for a new trial appears in the copy of the record of the judgment as set forth in the transcript. But no exception is preserved even there, to the action of the court in overruling the motion. It is also true that certain instructions have been copied into the transcript by the clerk. But there is not even so much as the judge's marginal "given" or "refused" to indicate the ruling of the court on any of these instructions. It is the well established law that the rulings of the trial court in giving or refusing instructions can not be reviewed unless the instructions, together with the rulings and proper exceptions thereto, are preserved in the bill of exceptions.

The condition of this record is such that the merits of the controversy between the parties can not be considered.

The judgment is affirmed.

Becherer v. Stock.

1. *Slander—Plea of Justification—Materiality of Evidence.*—On a trial of an action for slander, for imputing perjury, under a plea of justification, it appeared that the testimony alleged to be false, was given in a prior suit for work, labor and services, and was to the effect that one person had worked for another for five years, earning a good hired hand's wages, and that the services of a hired hand, at that time and in that neighborhood, were worth from fifteen to eighteen dollars a month. *It was held*, that if no other testimony had been offered on that trial, this of itself would have been sufficient to establish a liability under the pleadings for the amount shown, and hence the evidence was material to the issue.

2. *Slander—Imputation of Perjury—Evidence that the Person Was Sworn.*—On the trial of an action for slander, for imputing perjury, to sustain the issues, the plaintiff offered a bill of exceptions made in the suit in which it was claimed the perjury was committed. The opposite party admitted that the evidence in question was correct, and that he

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swore to it as set forth therein, and consented that it might be read to the jury. *It was held*, that as the party admitted he swore to it as set forth in the bill of exceptions, and as the bill of exceptions introduced in evidence, shows that he was sworn and testified, it is sufficient proof to show that the person was duly sworn before giving his testimony.

3. *Slander—Estoppel by Declaration.*—Where, in an action for slander, the declaration alleges that the plaintiff was duly sworn before he gave the testimony for which he is charged with perjury, and the defendant pleads a justification, the plaintiff can not be permitted to say that the averments of his declaration, which were necessary matters of inducement, and which are confessed by the plea, are untrue.

4. *Slander—Evidence of Corrupt and False Swearing.*—On the trial of an action of slander for the imputation of perjury, under a plea of justification, it is sufficient if the jury were justified in finding, from a preponderance of the evidence, that the testimony in question was given recklessly and positively, without knowledge of the facts, and if so, it was willful and corrupt according to the legal signification of these words.

Memorandum.—Action for slander. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO D. WILDERMAN, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893, and affirmed. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, WM. WINKELMAN, ATTORNEY.

Where the defendant, by his pleas, has based his defense on the fact that the plaintiff was guilty of perjury, he will be required to prove the fact of perjury. He is bound to make out the defense, even though he was not obliged to impute perjury in order to justify the words spoken. *Hicks v. Rising*, 24 Ill. 566; *Darling v. Banks*, 14 Ill. 46; *Welker v. Butler*, 15 Brad. 212.

The materiality of the matter sworn to must depend upon the state of the cause and the nature of the question in issue. It is the act of false swearing, in respect to a matter material to the point of inquiry which constitutes the crime, and not the injury which it may have done to individuals, or the degree of credit which was given to the testimony. *Pollard v. People*, 69 Ill. 153.

The accused has an undoubted right to be informed before

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Becherer v. Stock.

is alleged, he took the oath charged to be false. the right, in his defense, to prove that the person administering the oath did not have legal and competent authority for the purpose. In the absence of such authority there could be no perjury, and hence the necessity of an issue as to who administered the oath and that he had authority for the purpose. *Kerr v. People*, 42 Ill. 307; *People v. People*, 32 Ill. 499.

To commit perjury a person must willfully, corruptly and under oath or affirm. The false assertion made by the witness under oath, must be known to such witness to be false and must be intended by him or her to mislead the jury. *Coyne v. People*, 124 Ill. 24.

THE DEFENDANT'S BRIEF, A. FLANNIGAN AND DILL & SCHAEFER,
ATTORNEYS.

When a man swears to a thing "whereof consciously he knows to be true" he commits perjury; "although," adds Reade, "he believes it to be true, and although it turns out to be false." For the declaration of a witness is, that he knows the truth of what he states; and if he is conscious he does so, when he swears it, he means to swear falsely, however the fact may prove to be true. *Bishop's Cr. L.*, 8th Ed., Sec. 1048.

Perjury is the crime of one knowingly and willfully to swear to the truth of a statement which he knows to be false. *Byrnes v. State*, 102 N. Y. 5.

OPINION OF THE COURT, SCOFIELD, J.

Becherer, appellant, sued Rosa Stock, appellee, for damages by charging him with the commission of the crime of perjury while testifying as a witness on the trial of a cause wherein Mary Stoltz was plaintiff and appellee was defendant. Two pleas were filed, one the general issue, the other a plea of justification. The general issue was withdrawn from the trial, and the only question presented to the jury was the truth or falsity of the other plea. Appellant alleges error in the rulings of the court in admitting or excluding evidence and concedes that there was no error in the giving of the charge.

ing or refusing of instructions. He urges, however, a reversal of the judgment on the ground that the evidence fails to prove three material averments of the plea of justification, which are substantially as follows:

1. That Becherer's testimony in the case of Stoltz against Stock was material to the issue.

2. That he was duly sworn by the clerk of the Circuit Court before giving his testimony.

3. That he corruptly swore falsely on the trial.

We will consider these propositions in the order in which we have stated them.

1. On the trial of this case the declaration, plea and judgment in the case of Stoltz against Stock were offered and admitted in evidence. The declaration alleged an indebtedness of Stock to Stoltz for labor and services and for money found to be due on an account stated. The plea was the general issue. The judgment was in favor of the plaintiff in the action for \$1,000 damages, and for the costs of the suit. The testimony of appellant alleged to be false, which was introduced in evidence upon the trial of this case, was to the effect that Mary Stoltz had worked for appellee for five years, earning a good hired hand's wages, and that the services of a hired hand at that time, and in that neighborhood, were worth from \$15 to \$18 per month. If no other testimony had been offered, this of itself would have been sufficient to establish appellee's liability under the pleadings for the amount for which judgment was rendered. How then can it be claimed that the materiality of appellant's testimony was not shown?

2. It is urged that appellee failed to prove that appellant was duly sworn by the clerk of the Circuit Court. The record shows that the official reporter of the St. Clair Circuit Court was called as a witness, and that appellant's counsel said, "I will admit, your honor, that this is the bill of exceptions in the case of Mary Stoltz against Rosa Stock containing the evidence of Charles Becherer in that suit, and that the evidence reported there is correct, and that he swore to it as set forth in the bill of exceptions." Appellee's counsel

then inquired, "And may it be read to the jury?" And appellant's counsel answered, "Yes, sir, it may be read to the jury."

Here the testimony of appellant is called *evidence* by his own attorney and is admitted to be correctly reported. It is admitted that "he swore to it as set forth in the bill of exceptions," and the bill of exceptions as introduced in evidence shows that he was sworn and testified for the plaintiff. Now it is said that the proof fails to show that the circuit clerk administered the oath and that this is a fatal variance. To permit such an objection to prevail here would certainly be a perversion of justice. The admission that appellant was sworn, which was undoubtedly made to save time, must be taken to mean what was intended by the parties, and that is that further proof of this allegation of the plea would not be required. But the administration of the oath sufficiently appears from the allegation of the declaration that appellant was duly sworn before he gave his testimony in the said case of Stoltz against Stock. He can not be permitted to say now that this averment, which is necessary matter of inducement in the declaration and is confessed by the plea, is untrue.

3. It is said that the evidence does not show that appellant corruptly swore falsely on the trial. A detailed statement of the evidence, which was conflicting, would be unprofitable. It is sufficient to say that the jury were justified in finding from a preponderance of the evidence that Mary Stoltz did not do the work of a farm hand, and that, instead of earning a hired hand's wages, she did not earn more than six or eight dollars a month. The jury were also justified in finding that appellant's testimony was given recklessly and positively, and without a knowledge of the facts, and was therefore willful and corrupt, according to the legal signification of those words. 2 Bishop on Criminal Law, Sec. 1048; Johnson v. The People, 94 Ill. 505.

The judgment will be affirmed.

Coats v. Barrett.

Coats v. Barrett.

49	275
83	496
49	275
88	46
88	288

1. *Judgments—Sufficiency of Form.*—A judgment in the following form—"The court being fully advised in the matter, finds the issues for the plaintiff, and proceeds to render judgment in favor of the said plaintiff, and against the said defendant, for the sum of two hundred and forty-seven dollars and seventy cents and the costs of this suit, and execution is awarded for the same," while not in the most approved form, yet when tested by the rules of law, is not fatally defective.

2. *Judgments—Functions of the Judgment.*—It is not a function of the judgment to show what evidence the court acted upon. If a party wishes the court, trying the issues without a jury, to show what disposal was made of his defense, or to disclose the factors which enter into the findings, he may do so by properly framed propositions of law which the court is required to mark "held" or "refused."

3. *Judgments—Requisites of.*—The judgment of the court is giving the answer to the problem before it, and not the process by which the answer has been obtained.

4. *Statutes—Constructions of—Prior Statutes Applicable to this Court.*—The statute provides that no judgment shall be reversed in the Supreme Court for mere error in form, if it be for the true amount of indebtedness or damages. There is no doubt that this act, although enacted before the organization of the Appellate Court, is sufficiently broad in its scope and elastic in its terms to include any courts thereafter to be created, and given part of the functions which were to be exercised by the Supreme Court when the enactment went into operation.

5. *Judgments—Test for Determining the Sufficiency.*—Whatever appears upon its face to be intended as the entry of a judgment, will be regarded as sufficiently formal if it shows (1) the relief granted, and (2) that the grant was made by the court in whose record the entry was written. In specifying the relief granted, the parties of whom and for whom it is given must be sufficiently identified. It must show the plaintiff who recovers; the defendant, against whom the recovery is had, and the specified thing or amount of money recovered.

Memorandum.—Appeal from a judgment rendered by the Circuit Court of Jefferson County; the Hon. EDMOND D. YOUNGBLOOD, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, WILLIAM H. GREEN, ATTORNEY.

The judgment is defective in that it shows no action of

the court rendering judgment for appellee. It recites that the court proceeds to render judgment in favor of the said plaintiff, and does not order or adjudge his right to a recovery. It is a mere recital of the clerk and not the act of the court. While a judgment will not be reversed for want of form, it will be, where found to be defective. *Myer v. Village of Teutopolis*, 131 Ill. 556; *Faulk v. Kellums*, 54 Ill. 188.

APPELLEE'S BRIEF, ALBERT WATSON, ATTORNEY.

We do not contend that the form of judgment used by the clerk is the most approved form, but we do think it is sufficient to make a valid, legal judgment, and that grave injustice would follow a reversal upon so purely technical and unmeritorious a question. *Freeman on Judgments*. Sections 46 to 51 inclusive. (Ed. of 1892.)

In *Wells v. Hogan*, Beecher's Breese, 337, the Supreme Court says: "No particular form is required in the proceedings of a court to render its order a judgment. It is sufficient if it be final, and the party may be injured." Applying this rule to our judgment, we find it amply sufficient. See also *Minkhart v. Hankler*, 19 Ill. 47.

In *Benedict v. Dillehunt*, 3 Scam. 287, the amount of the judgment could only be known by reference to a certain paper bond, but the Supreme Court sustained it because *Id certum est quod certum reddi potest*. See also *Wilmans v. Bank, etc.*, 1 Gilm. 667.

Finally we cite Sec. 3, Chap. 7, Rev. Stat. of Illinois. No judgment shall be reversed for mere error in form, if the judgments be for the true amount of indebtedness or damages.

OPINION OF THE COURT, SCOFIELD, J.

The bill of exceptions in this case having been stricken from the record on motion of appellee, nothing remains for our consideration save the objection made to the judgment, which is as follows: "The court being fully advised in the matter finds the issues for the plaintiff and proceeds to render judgment in favor of the said plaintiff and against

the said defendant for the sum of two hundred and forty-seven dollars and seventy cents, and the costs of this suit, and execution is awarded for the same." It is urged that the judgment should show specifically what disposition was made of appellant's set-offs. This is not the function of a judgment. If a party to a suit wishes the court, trying the issues without a jury, to show what evidence is acted upon, and what disregarded, or to disclose the factors which enter into the finding or judgment, he may do so by properly framed propositions of law which the court is required to mark "held" or "refused." The judgment itself should give the answer to the problem, and not the process by which the answer has been obtained.

It is also urged that the statement "proceeds to render judgment" is a mere recital by the clerk, and does not show the action of a court engaged in rendering judgment. If such is the case, why was an execution awarded? Does the court award an execution first, and render judgment afterward? The second assignment of error, "The court erred in rendering judgment against the defendant," indicates a strong suspicion on the part of appellant's able counsel that the court not only proceeded to render judgment, but actually succeeded in doing so. The statutes of this State provide that "no judgment shall be reversed in the Supreme Court for mere error in form, if the judgment be for the true amount of indebtedness, or damages." There is no doubt that this enactment of the legislature, made before the organization of the Appellate Court, is sufficiently broad in its scope, and elastic in its terms, to include any courts thereafter to be created, and given part of the functions which were exercised by the Supreme Court when the enactment went into operation. If such be the case, this court is precluded by the mandate of the legislature, from reversing this judgment for mere error in form.

In *Wells v. Hogan*, Breese, 337, it was held that no particular form is required in the proceedings of a court to render its order a judgment, but that it is sufficient if the

order be final, and the party against whom it is directed, may be injured thereby.

In *Minkhart et al. v. Hankler*, 19 Ill. 47, it was held that whatever language may be used in the record, if it is apparent what the finding of the court is, and that finding is correct in law, a judgment will not be reversed because of the use of untechnical or inappropriate words. The tests for determining the sufficiency of a judgment in matters of form are very clearly stated in *Freeman on Judgments*, Sec. 50, in the following language: "I think, however, that from the cases, this general statement may be safely made: that whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it show, first, the relief granted, and, second, that the grant was made by the court in whose records the entry is written. In specifying the relief granted, the parties of whom and for whom it is given must, of course, be sufficiently identified. According to the Supreme Court of Alabama, 'A judgment should show the plaintiff who recovers, the defendant against whom the recovery is had, and the special thing or amount of money recovered.'" While the judgment in question is not in the most approved form, yet when tested by the rules thus laid down, it is not fatally defective. The judgment will be affirmed.

Tucker v. Burkitt.

1. *Practice—Objection, Taking Exceptions, etc.*—On the trial of an action, at the close of the evidence on the part of one of the litigants, the attorney for the opposite party objected to all the testimony admitted, and took exceptions, etc. *It was held*, that such an objection was utterly valueless. A general objection to all the evidence on one side of a case will not be considered.

2. *Practice—Objections to Testimony.*—An objection, to be availing, must be made before a question is answered. Or if the answer is not responsive, a motion to strike it out must be made at the earliest opportunity. It would be a dangerous practice to permit counsel to allow

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questions to be answered, either intentionally or negligently, and then to interpose objections in those instances in which the answers are deemed harmful.

3. *Exceptions—Waiver, etc.*—Where an exception has been preserved to the ruling of the court, but has not been considered by counsel sufficiently important to require mention in his argument, it will not be noticed by the Appellate Court.

4. *Exceptions to Rulings of the Court upon Evidence Heard in the Absence of the Jury.*—Where the court heard evidence in the absence of the jury, upon the question of the execution of a lease, to which no exceptions were taken, but an exception was taken to the remarks of the court in the ruling of the court upon the question, the record not showing that any of the testimony so heard by the court was repeated in the presence of the jury, or that any remark or ruling of the court, made while the jury was absent, was repeated or referred to afterward in the presence of the jury, *it was held*, that the party objecting could not have been prejudiced by any evidence heard, or ruling made, when the jury were absent.

Memorandum.—Distress for rent. Appeal from a judgment rendered by the Circuit Court of Wayne County; the Hon. EDMUND D. YOUNGBLOOD, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, BUNCH & BONHAM, ATTORNEYS; C. S. CONGER, OF COUNSEL.

To deny the execution of a writing, the plea must be verified. Sec. 34, Chap. 110, R. S. Unless defendant files verified plea denying execution of contract he can not deny execution at trial. *Gaddy v. McCleave*, 59 Ill. 182. Denial by defendant may be by affidavit filed with general issue. The plea general issue alone is not sufficient. *Templeton v. Hayward*, 65 Ill. 178. "If defendant has filed no plea nor affidavit, such are admissible without proof of execution." *Shufeldt v. Henderson*, 26 Ill. App. 593.

APPELLEE'S BRIEF, CREIGHTON & KRAMER, ATTORNEYS.

The only issue that was made in this case, or that could have been made, was whether or not the relation of land-

lord and tenant existed, and if so whether or not any rent was due. *Alwood v. Mansfield*, 33 Ill. 452; *Kruse v. Kruse*, 68 Ill. 188.

OPINION OF THE COURT, SCOFIELD, J.

Appellant levied a distress warrant on certain property of appellee for rent alleged to be due him. On the trial of the case in the Circuit Court, the jury rendered a verdict for appellee. A motion for a new trial was made and overruled and judgment was rendered on the verdict. As far as the record shows, no instructions were given to the jury, no request for instructions being made by either party. Numerous errors have been assigned, but these may be reduced to two general propositions: first, that the court admitted improper evidence, and second, that the verdict is against the law and the evidence. Appellant made some proof of the execution of the lease sued on and thereupon the instrument was admitted in evidence without objection. Appellant then introduced evidence to show that rent was due under the lease and rested his case. So far no exception had been taken to the rulings of the court by either party. Appellee then opened his case by testifying that he did not read the lease before signing it. His counsel then asked him to state what was the arrangement between him and the colonel (appellant's agent) as to the leasing of the land. Objection was made that such evidence was not admissible without a sworn plea denying the execution of the lease. After some discussion of the question by counsel, the court said, "I think it is for the court to determine whether it is the written instrument of the defendant or not. The jury will retire out of the hearing of the court."

Thereupon the jury retired in charge of an officer, and the court, in the absence of the jury, heard evidence on the question, which evidence begins on the 9th and ends on the 15th page of the record. No exception on the part of appellant to any ruling of the court was made till after all of this evidence had been heard.

The court then decided that the lease should go to the

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jury with the evidence of the execution of the same, and that the jury should determine whether it was the contract of appellee or not. To this ruling appellant excepted. Afterward the jury was brought into the room, and the trial was resumed by the examination of a witness on other branches of the case; but the record does not show that the evidence heard in the absence of the jury was repeated to the jury *verbatim*, or in substance, or otherwise, or that any remark or ruling of the court made while the jury were absent, was repeated or referred to afterward in the presence of the jury. Therefore, appellant could not have been prejudiced by any evidence heard, or rulings made, when the jury were not in the court room. If such evidence was repeated to the jury, or if the ruling of the court was made known to the jury, it was the duty of appellant to make that fact to appear plainly in the bill of exceptions, which is his pleading, and must be taken most strongly against him. *Rogers v. Hall*, 3 Scam. 5; *Garrity v. The Hamburger Co.*, 136 Ill. 499; *Monroe v. Snow et al.*, 33 Ill. App. 230.

It is insisted by appellant that the court erred in permitting appellee to introduce evidence of a set-off when no plea of set-off had been filed. Without considering the necessity of filing such a plea in a case like the one now before us, it is sufficient to say that no exception to any ruling of the court on the question appears in the record. It is true that at the close of appellee's evidence in chief appellant's counsel said, "We object to all the testimony on the part of the defense and take exception." Such a statement is utterly valueless. A general objection to all the evidence on one side of a case will not be considered. The objection, to be availing, must be made before the question is answered, or if the answer be not responsive, a motion to strike out must be made at the earliest opportunity. It would be a dangerous practice to permit counsel to allow questions to be answered, either intentionally or negligently, and then to interpose objections in those instances in which the answers are deemed harmful.

A few exceptions have been preserved as to rulings in minor

matters, which could not have affected the verdict, and have not been considered by appellant's counsel sufficiently important to require mention in their argument. These exceptions will not be noticed further.

Lastly, it is contended that the verdict is contrary to the law and the evidence. Under a strict construction of the bill of exceptions, appellant is in no position to raise this question. The bill of exceptions shows that appellee ("*the defendant*") excepted to the decision of the court in overruling the motion for a new trial. It is fair to presume, however, that this is a clerical error, and that it was appellant, and not appellee, who excepted to this ruling of the court. On a careful examination of the evidence, we find no reason to disapprove of the verdict of the jury. Taking it for granted that the execution of the lease could not be denied without a sworn plea, the other defenses were nevertheless sufficiently proved to justify a verdict for appellee.

We perceive no error in the record, and the judgment is therefore affirmed.

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East St. Louis Connecting Railway Co. v. O'Hara.

1. *Jury—Findings, When Not to be Set Aside.*—Where the findings of a jury do not appear to be manifestly against the evidence or to have resulted from passion or prejudice, the verdict will not be set aside.

2. *Railroad Trains—Ordinances Regulating the Speed of, etc.*—It is within the province of a city council to enact ordinances prohibiting railroad companies from running their trains at a greater rate of speed than six miles an hour within the limits of the city, and to require them during the night time and when dark, to have and keep the headlights burning on the front ends of their engines and the bells thereon ringing, for the purpose of indicating and giving notice of the movement of their locomotives, etc.

3. *Special Findings—Personal Injuries—Willful Commission of Injuries Complained of.*—Where, in a suit against a railroad company for personal injuries, the evidence disclosed the facts, that at a place within the limits of a city large numbers of persons were in the habit of crossing the track, and the ordinances of the city required that the bell of the locomotive engine of railroad companies should be continuously rung while running within the city, and when running in the night time a bright and conspicuous light should be kept at the forward end of the

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locomotive, or if backing, at the rear end of the same, so as to show the direction in which the same was moving, and prohibiting the running, within such limits, of any passenger car or train at a greater rate of speed than ten miles, and freight trains at six miles an hour, there being evidence that warranted the finding of the jury that no bell was rung at said place, and no headlight was on the engine to disclose the direction in which it was moving in passing along the railroad track at said place, it would be sufficient evidence, coupled with the rate of speed, to warrant a special finding by the jury that the servants and agents of the railroad company willfully committed the injuries complained of.

4. *Negligence—What Amounts to Willful or Wanton Negligence.*—The running of a locomotive in the night at an unlawful rate of speed, without signaling or without lights, along a tract within the limits of a city at a place where many people were in the habit of crossing, is negligence so gross that it amounts to willful or wanton negligence, and as such will authorize a recovery, whether the place at which the injury was inflicted was a public street or the railroad right of way.

5. *Willful Negligence—Violation of City Ordinance.*—The willful disregard by a railroad company, or its agents or employes, of the duty imposed by an ordinance of a city regulating the speed of trains and the manner of moving them at night within the city limits, when sufficiently pleaded and in evidence before a jury, will warrant a special finding that the railroad company is guilty of willful negligence.

6. *City Ordinances Regulating Speed of Trains—Construction.*—An ordinance regulating the speed of railroad trains within the limits of the city is sufficiently comprehensive to include an engine without cars attached, as the principal purpose of the ordinance is to prevent railway accidents by running at too high a rate of speed.

7. *Special Findings Conclusive.*—Where, upon a trial at law, the evidence is conflicting upon a material part in the case, and the jury, in response to a special interrogatory, return a finding, it will be conclusive upon that question.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO D. WILDERMAN, Circuit Judge, presiding. Heard in this court at the August term, A. D. 1892, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

CHARLES W. THOMAS, attorney for appellant.

APPELLEE'S BRIEF, WM. WINKLEMAN, JESSE M. FRELS, AND
VIRGIL RULE, ATTORNEYS.

“Where the evidence is conflicting, the verdict of a jury is conclusive, and the court has no authority to set it aside un-

less it is shown to be manifestly against the evidence, or to have resulted from passion on the part of the jury." *Hinckley v. Horazdovsky*, 33 Ill. App. 260.

The questions as to whether the plaintiff exercised proper care and caution, and whether the defendant was guilty of negligence causing the injury, are questions of fact for the jury to determine from the evidence. *Pennsylvania Co. v. Frana*, 112 Ill. 405; *C., St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 596; *L. S. & M. S. Ry. Co. v. Johnsen*, 135 Ill. 647; *L. S. & M. S. Ry. Co. v. O'Conner*, 115 Ill. 255; *L. S. & M. S. R. R. Co. v. Brown*, 123 Ill. 174; *Chicago v. Keefe*, 114 Ill. 228; *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 587; *The Chicago Hansom Cab Co. v. Havelick*, 131 Ill. 179.

The jury were authorized to look at the conduct of the engineer in the light of all the facts in the case. It has been said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and, in the nature of things, is so dependent upon the particular circumstances of each case as not to be susceptible of general statement." 2 *Thomp. Neg.* p. 1264, Sec. 53. In *Railroad Co. v. Godfrey*, 71 Ill. 500, it was said that where a trespasser is injured, the railroad company is liable for "such gross negligence as evidences willfulness." *Blanchard v. Railroad Co.*, 126 Ill. 416. What is meant by 'such gross negligence as evidences willfulness?' It is "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness." 2 *Thomp. Neg.* p. 1264, Sec. 52; *Harlan v. Railway Co.*, 65 Mo. 22.

OPINION OF THE COURT, PHILLIPS, P. J.

Appellant is the owner and operator of a switching road used for transferring cars to and from numerous railways having their termini in East St. Louis. It is a double track road and run north and south along the bank of the Mississippi river. Front street in the city of East St. Louis, sixty feet wide, runs north and south along the east side of the wharves of the Wiggins Ferry Co., and there is a conflict in

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the evidence as to whether the tracks of the railroad are on Front street. The plaintiff's contention is that the tracks are on the western part of the street, and the defendant claims that the west track is upon the street at no point, but that the east rail of the east track, only, is laid upon the street. On the 23d day of October, 1889, plaintiff's arm was cut off, being run over by a locomotive on the west track. The injury occurred in the night time. The plaintiff brings the action against the defendant and charges it with negligence in failing to ring a bell, and failing to have the headlight burning, and alleged that the train was running at a dangerous and unlawful rate of speed, and further charges that the defendant wantonly and willfully failed to have a headlight burning or ring the bell, and wantonly and willfully ran at a high rate of speed. Defendant pleaded the general issue and a trial was had which resulted in a judgment for plaintiff for \$5,000, and a motion for a new trial and a motion in arrest of judgment being overruled, the defendant brings the record to this court by appeal, and assigns error in overruling the motion for new trial and entering judgment on the verdict, and in not arresting the judgment.

There is conflict in the evidence on the question as to whether the railroad track at the place of the injury is on the public street, several of the plaintiff's witnesses claiming that it was on the public street, and witnesses for defendant denying that the track at the place where the injury occurred was on said street. There is also conflict in the evidence as to whether the engine which ran over plaintiff's arm at the time of the injury had a headlight burning or was ringing the bell, and with this conflict in the evidence the jury, asked to find, found specially that the headlight on the locomotive which struck plaintiff was not burning at the time of the accident, and that the bell on the locomotive which struck him was not ringing, and the place where plaintiff was injured was a public street. These findings of the jury do not appear to be manifestly against the evidence, or to have resulted from passion or prejudice, and in

this conflicting state of the evidence the verdict of the jury ought not to be disturbed. *Hinckley v. Horazdovsky*, 33 Ill. App. 259; *Calumet River Co. v. Moore*, 124 Ill. 329; *C. & E. R. R. Co. v. Blake*, 116 Ill. 163.

The last count of plaintiff's declaration charges the defendant with wanton and willful negligence. Gross want of care and disregard for the rights of others may be such as to justify the presumption of willfulness or wantonness. The second count of plaintiff's declaration alleges it was defendant's duty by sections 583 and 584 of the general ordinances of the city of East St. Louis, not to run at a greater rate of speed than six miles an hour, and during the night time, and when dark, to have and keep the headlight burning on the front end of its engine, and have and keep the bell thereon ringing for the purpose of indicating and giving notice of the approach or movement of locomotive engines while moving on said track. The evidence discloses the fact that a large number of persons were in the habit of crossing the track of defendant's road, passing from the transfer stables to the ferry boats, and the plaintiff, who was a driver at the transfer stables, left there for the purpose of crossing the track to reach the ferry boat to go to his home on the west side of the river, and sought to cross the track at a place where much passing was done.

Section 584 of the ordinances of the city, read in evidence, requires that the bell of the locomotive engine shall be continuously rung while running upon any railroad track within the city, and while running in the night time, shall have and keep a bright and conspicuous light at the forward end of the locomotive, or, if backing, shall have a conspicuous light at the rear end of the engine, so as to show the direction in which the same is moving. Section 583 is that no railway company, or conductor, or engineer, or other employe of the company, managing or controlling any locomotive engine, car or train, shall run or permit to be run, within the limits of the city, any passenger train or car, at a greater rate of speed than ten miles, and freight trains at six miles per hour. These ordinances were in evidence, and it was within the province of the city council to enact such

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ordinance, and there being evidence that warranted the finding of the jury that no bell was rung, or no headlight on the engine, or no light to disclose the direction in which it was moving in passing along the railroad track at a point where much passing was done, would be sufficient evidence, coupled with the rate of speed, to warrant the finding of the jury which was specially found, that the servants and agents of the defendants willfully committed the injury; for the negligence would be so gross in running in the night time at such a rate of speed, without signaling or without light, that it would amount to willful or wanton negligence; and such being the case, even on the theory that the place where the plaintiff was injured was not a public street, but the right of way of defendant's road, would still authorize a recovery. The willful disregard of a duty imposed by the ordinances of the city, which were sufficiently pleaded and in evidence before the jury, would warrant such finding. The ordinance having reference to the speed of trains, is sufficiently comprehensive to include an engine without cars attached.

The principal purpose of the ordinance was to prevent railway accidents, from running at too high rate of speed. The record shows that the plaintiff offered in evidence sections 318, 319 and 427 of the ordinances of the city of East St. Louis, Sec. 318 being substantially a copy of Sec. 87, Chap. 114, Starr and Curtis' Statutes, and Sec. 319 being substantially a copy of Chap. 114 of same, Sec. 427 being in reference to special assessments or improvements. While we see no relevancy of these ordinances to the questions before the jury, yet it does not appear that in any manner the defendant's case was prejudiced thereby, and the admission of sections 318, 319 and 427 was not such error as would require the reversal of the judgment in this case. It is contended by the defendant that the plaintiff, at the time he was injured, was lying on the track of defendant's road, plaintiff claiming that he was standing up when struck, and knocked down, and on this question the evidence is conflicting, and the jury, in response to special interrogatories, found that the plaintiff did not lie upon defendant's tracks

before he was knocked down, and the verdict of the jury on that question is conclusive. John Fries was called as a witness by plaintiff and testified, and counsel for plaintiff, in his closing argument, in commenting on the testimony of Fries, contended before the jury that Fries had committed perjury and had been bribed, to which defendant's counsel objected and moved the court to direct the counsel to refrain from such comments. The court did not pass upon the question, and the remarks of plaintiff's counsel were repeated, and the defendant excepted. From the testimony of the witness as it appears of record we are not disposed to hold that counsel for the plaintiff had not the right of criticising his testimony, for although called by the plaintiff and testifying to certain facts, yet from his entire testimony we can not see that the plaintiff's counsel must be compelled to treat him with very great respect, but had the right to criticise the witness' testimony.

There was no error in the instructions given for the plaintiff, the instruction being under the second count of the declaration for the alleged willful acts of the defendant. It is urged by the appellant's counsel that it is not possible that appellant's servants willfully refrained from lighting a headlight, and willfully refrained from ringing a bell and willfully ran at a high rate of speed. These averments are all made in the second count of the declaration, and there is proof authorizing this verdict of the jury that there was no bell rung, nor headlight, and the train running at a high rate of speed, and, as we have already discussed the question, such acts at such place and at such time of night, might be regarded as a wanton or willful act on the part of the defendant's servants, and authorize the instruction to be given that if the jury found the defendant guilty of negligence, charged in the second count of plaintiff's declaration, they might find the defendant guilty. Nor was it error to refuse the defendant's fourth instruction; for if the acts of the defendant's servants were wanton and willful, as alleged in the second count of the declaration, the instruction ought not to be given. We find no reversible error in the record. The judgment is affirmed.

Thompson et al. v. Evans et al.

1. *Torts.—Recovery against Joint Trespassers.*—In an action of trespass against several defendants, jointly, unless the evidence shows a joint act on their part, a joint recovery against them can not be sustained.

2. *Trespasses—What Acts are Sufficient to Create Joint Liability.*—The mere expression of an opinion by the city attorney as to the duty of another officer under the ordinance, and in the absence of the proof of malice, a mistakenly expressed opinion will not authorize the recovery of damages against him for acts committed by the other officer, in pursuance of such opinion. So, where a person erected a shed within the fire limits of a city, and the city attorney, being called upon for his opinion in regard to the matter, expressed it that the building was erected in violation of the ordinance, and that it would be the duty of the marshal to tear it down if the person erecting it did not remove it, and the marshal having torn it down, *it was held* that the city attorney, by reason of the opinion given, was not jointly liable in trespass with the marshal, no malice being shown.

3. *Damages—Excessive.*—In an action for tearing down a shed, where the evidence shows the actual damage to be \$80, a verdict and judgment for \$200 can not be sustained, where there is an absolute want of proof of malice.

4. *Damages—Exemplary--Not Proper, When.*—Where an act, complained of as a trespass, was done by an officer without malice, under a mistaken idea of the law, and while endeavoring to discharge his duty, it is improper to award exemplary damages.

5. *Cities and Villages—Fire Ordinances—Notices in Writing, etc.*—Under an ordinance establishing fire limits, and providing that wooden buildings, which might be erected, removed, or repaired, contrary to the provisions of the ordinance, should be deemed nuisances, and upon information thereof it should be the duty of the mayor, after having given the owner or builder thereof three days' notice to remove them by an order in writing, to require the city marshal to raze such buildings to the ground, it is not necessary to give the order in writing to the marshal. The written notice provided for in the ordinance, as an order in writing, is a notice from the mayor to the owner or builder of the building to remove the same, etc., but so far as regards the liability of the mayor and attorney for the acts done by the marshal, it would make no difference whether the notice was in writing or not.

6. *Cities and Villages—Construction of Ordinances.*—The ordinance of a city being in writing, the effect of the same is a matter of construction for the court, and not to be construed by the jury; so where an ordinance fixing the fire limit in a city provided that in case of the erection of a building contrary to its provisions it should be the duty of the

mayor, after having given the owner thereof three days' notice to remove the same by the order in writing, to require the city marshal to remove such building, *it was held*, that it was for the court to determine whether a written order to the marshal was necessary, and not to leave that as a question of fact for the jury.

Memorandum.—Action of trespass, for removal of building. Appeal from the Circuit Court of Jackson county, the Hon. JOSEPH P. ROBARTS, Circuit Judge, presiding. Heard in this court at the August term, 1892. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

Ordinance referred to in the opinion of the court :

SEC. 25. Any wooden building which may be erected, removed or repaired, or in process of erection, enlargement, removal or repair, contrary to the provisions and requirements of this ordinance, shall be deemed, and is hereby declared a nuisance, and upon information it shall be the duty of the mayor, after having given the owner or builder thereof three days notice to remove or abate the same by an order in writing, to require the city marshal to raze such building to the ground. The expenses of the removal of such building shall be reported by the city marshal to the city council. The owner of such building shall be liable for the payment thereof, and if not at once paid, it shall be the duty of the city attorney to bring suit therefor in the police court, or some court of competent jurisdiction, in the name of the city.

F. M. YOUNGBLOOD and W. W. BARR, attorneys for appellants.

WILLIAM A. SCHWARTZ, attorney for appellees.

OPINION OF THE COURT, PHILLIPS, P. J.

This is an action of trespass brought by appellees against appellants, which resulted in a verdict and judgment against appellants for \$200, and a motion for a new trial being overruled, the record is brought to this court by appeal.

Appellees erected a shed on the public square in the city of Carbondale, within the fire limits of the city, as alleged, which was torn down by the city marshal. The only connection shown between Burket and Thompson, appellants, with the alleged trespass, is that Burket was mayor, and Thompson city attorney, of the city of Carbondale, and

each, in their official positions, gave certain advice to the city marshal. There is no evidence to connect Thompson with the tearing down of the shed, which is the gist of this action, except the opinion expressed, that the building was erected in violation of the fire ordinance, and that it would be the duty of the marshal to tear it down if the plaintiff did not remove it. He was occupying the position at that time, of city attorney, and on being requested to give his opinion to the mayor and city marshal, expressed the opinion on the ordinance which fixed the fire limits as to the character of buildings to be erected within the same, and in the expression of that opinion, did not order the act of tearing down the building, nor had he the authority to do so. It was the mere expression of an opinion by a city attorney as to the duty of another officer under the ordinance, and in the absence of the proof of malice, a mistakenly expressed opinion would not authorize a recovery of damages.

The evidence shows the shed cost \$75 to purchase the lumber and erect the same, and after the same was torn down the most of the material was subsequently used by the plaintiffs, and the machinery that was exposed to sale under the shed, it is claimed, was damaged to the extent of \$80. This is the extent of damage sought to be shown, and a verdict and judgment for \$200 was not authorized by this evidence where there is an absolute want of proof of malice. At most, the proof is the act of officers, and if a mistaken act, would not authorize exemplary damages. All the evidence in the record shows that the acts done in the removal of the buildings were acts done as officers of the city, without malice, endeavoring to discharge a duty. It is objected that the order to the marshal to remove the building was not given in writing. It is not necessary to give a written order to the marshal under section 25 of the city ordinance offered in evidence to remove a building from the ground when erected in violation of the provisions of the fire ordinance. The written notice provided for by that section as an order in writing, is a notice from the mayor to

the owner, or builder of the building within the fire limits, to remove the same, and as to these defendants it would make no difference that the order to the marshal to remove the building was not in writing. The damage as shown, taking into consideration the injury to the machinery exposed and the original cost of the building regardless of the fact that the material of which the building was constructed, was subsequently used by the plaintiff, could not have exceeded \$155. Hence in the absence of all proof of malice, a verdict for \$200 could not be sustained. No written order to the marshal being necessary the fourth instruction given for plaintiff, which is as follows, was erroneous: "The court instructs the jury that if you believe from the evidence that section 25 of the ordinance before you requires the authority from the mayor to the city marshal to tear down a building, to be in writing, then it would be a trespass to tear down any kind of a building by the marshal without a written order, and all who should aid, abet, advise, encourage or assist in such trespass are jointly guilty with the marshal in tearing down such building." Further, the ordinance was in writing, and its effect was a matter of construction for the court, and not to be left to be construed by the jury. It was for the court to determine whether a written order to the marshal was necessary and not to leave that as a question of fact to the jury. The verdict can not be sustained.

The judgment is reversed and the case remanded.

49	292
53	504

C. C. & St. L. Ry. Co. v. Dixon.

1. *Evidence—Burden of Proof.*—Under a declaration which charged negligence in not keeping the cars and machinery thereof in good repair, but which, on the contrary, "were out of repair, and not sufficient for the purposes used," it is incumbent upon the plaintiff to prove not only a defect in the machinery, but the defect that caused the injury. Merely proving that there was a defect is not sufficient; not only so, but under the averments of the declaration, the proof must show that the defect causing the injury was known to the defendant, or, by the exercise of reasonable care, it could have been known.

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2. *Instructions—Departure from the Issue on Trial.*—Where a cause of action is based upon the want of repairs and knowledge of such condition, an instruction which states that the master of a railroad company, or employer, is bound to use reasonable care, skill and judgment, to furnish suitable machinery and implements properly constructed, and ordinarily skillful and trustworthy agents or workmen, and if the employer does not use such care, skill and judgment, and injury results therefrom to an employe, the employer will be responsible for such injury, is erroneous, because it makes his liability depend upon furnishing of machinery, properly constructed, which is not made an issue in the case, either by the pleadings or the evidence.

3. *Notice to an Employer—When Unnecessary.*—In an action for injuries, based upon an improper construction of machinery, a notice to the owner, etc., is not necessary; but it is otherwise in cases of a defect occasioned by use, or for want of repair.

4. *Instructions Governing the Law of Notice—Personal Injuries.*—In a case against a railroad company for injuries, based upon a want of repair of a coupler and notice of such condition, an instruction which states that if the plaintiff, while in the exercise of reasonable care, was injured while attempting to make a coupling, and that said injury was caused by reason of the coupler and the machinery connected therewith being out of repair, the jury should find for the plaintiff, is erroneous, because it ignores the law of notice and makes the liability depend solely on there being a defect at the time of the injury, and such defect being the cause thereof, without reference to when the defect occurred, or that by the exercise of reasonable care it would have been discovered by the company before the injury occurred.

5. *Instructions—Must Not Assume the Existence of Facts.*—In an action for the recovery of damages for personal injuries against a railroad company upon the ground that its machinery was out of repair, an instruction which apparently assumes such to be a fact is erroneous.

Memorandum.—Action for personal injuries. Appeal from a judgment rendered by the Circuit Court of Wabash County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, A. D. 1892. Opinion filed September 8, 1893.

STATEMENT OF THE FACTS BY THE COURT.

Appellee's left hand near the wrist was crushed between the deadwoods of two cars at St. Francisville, on the 4th day of July, 1891, while, as brakeman for appellant, he was attempting to make a coupling. The injury was so serious that the arm had to be amputated.

The declaration avers that "the couplers, by which said cars were fastened together, were out of repair and not suffi-

cient for the purpose used, and the defendant by the exercise of reasonable care could have known of said defect, and while the plaintiff was in the performance of his duty as brakeman, with due care and without knowledge of the condition of said machinery, he had his left hand caught by and in the machinery used for coupling the said cars together, thereby injuring him," etc.

The plaintiff had been a railroad man about twenty-five years, and describes the accident substantially as follows: when his train—a freight train—reached St. Francisville, some empty box cars had to be taken or moved from the side track. In doing so, there was a coupling to be made of the cars at the side track, which cars had iron deadwoods, located on each side of the draw bars and a little above.

The couplings on these cars were what are called Ames couplers—bull tongues, commonly called. Both of the couplers were alike, except that the still car, to the right, had no bull tongue in; the tongue was out entirely; while the car to the left—the moving car—had a bull tongue in. As the running car was slowly pushed back by the engine to make the coupling, he stepped in front of that car, with his left side rather toward the car, and moved back with it. Just before the cars came together, he reached over the deadwood and caught hold of the iron pin, so as to push or drop it through the hole in the draw bar or draw head and the hole in the bull tongues, where the bull tongues should enter the draw head of the right, or still car, and thereby make the coupling. He did not have to adjust the bull tongue in the draw head of the left or moving car, so as to make it enter the aperture of the draw head of the right or still car, as the cars were of the same height. The bull tongue projected straight out from the draw head of the moving car and had a hole in it for the pin to drop through, thereby answering in the place of an ordinary car link. The pin which he had seized with his left hand projected through the upper part of the draw head, and into the aperture entered by the bull tongue, so that as the bull tongue of the moving car entered the draw head of the still car, the end

of it struck the projecting end of the pin, thereby pressing the upper end of the pin outward toward and against the raised upper lip at the mouth of the iron draw head, and thus caught the finger of the left hand between the pin and the lips of the draw head and held him there, as he says, "until the car came ahead, and the car bounced away." When the cars came together the draw heads receded until the deadwoods of the cars came solidly together and on the reaction, he says the draw heads of the right or still car pulled out nine or ten inches, and he was still held fast. He says then "I grabbed hold of the pin with this—the right—hand to get loose, and it held me in that position until it (suppose he means deadwoods) got very near together again and it took up the slack and I got my hand loose and pulled it out but did not get it out quick enough and got it caught between the deadwoods."

The plaintiff was then asked by his counsel these questions:

"Q. I will ask you to state to the jury what condition these couplers were in. A. The one to my left, it had a lever on, and the chain attached to this bull tongue, that was broken off.

Q. What was broken off? A. The lever.

Q. Which part of it was broken? A. That was broken on the left; this link was in there so you could work it any way you wanted to, but the one to my right, (the bull tongue in car to his right,) was out entirely.

Q. Now state, Mr. Dixon, in making a coupling of that kind, where the coupler is out on one side and in on the other, how the coupling is made? A. You can come back and it is not necessary to catch hold of the pin (means link) at all, because it is all of one height."

The bull tongue was in left or moving car and that was used for a link.

"Q. State to the jury what condition as to repair the couplers were in, so they may understand it. A. The car to my right—the bull tongue was out entirely; the one to my left, the lever that works the bull tongue was broken,

and this draw head to my right certainly must have been out of order, for there was a great deal of lost motion there. It pulled out at least nine or ten inches; most generally it pulls out three or four inches."

It is more dangerous to make couplings of cars that have deadwoods. He says such cars, however, were in general use.

On cross-examination he is asked:

"Q. What defect was there about this coupling? A. I don't know, unless the springs were broken or the following plates out. Q. You can't testify positively as to that? A. Of course not. Q. You knew before you entered this car that the lever was gone—broken? Oh, yes; certainly. Q. You knew that coupling where the lever is gone is more dangerous than the other kind, didn't you? A. Oh, yes; more dangerous for a man to go in, of course.

He says no one directed him to make that particular coupling.

"Q. You knew it was more troublesome and dangerous to make that kind of a coupling, before you went in there, than to make an ordinary coupling? A. Why, of course; they are all dangerous. Q. The business of a brakeman is dangerous? A. I should think it was."

APPELLANT'S BRIEF, WILLIAM H. DYE, ATTORNEY, ROBERT BELL, OF COUNSEL.

The burden rested upon the plaintiff to show that there existed a defect in this coupler and its machinery, which caused the injury, and that the existence of this defect was negligence on the part of the appellant. *Sack v. Dolese* (Ill.), 27 N. E. Rep. 63.

Without proof that knowledge of the defect causing the injury might have been obtained by reasonable diligence, there could be no recovery. The burden was upon the plaintiff to make such proof. *Provision Co. v. Hightower*, 92 Ill. 139; *R. R. Co. v. Pratt*, 14 Ill. App. 436; *R. R. Co. v. Stites*, 20 Ill. App. 648; *Ry. Co. v. Troesch*, 68 Ill. 545; *R. R. Co. v. Platt*, 89 Ill. 141; *Ladd v. R. R. Co.*, 119 Mass. 412.

Failure of employers to furnish suitable machinery furnishes no excuse for the conduct of an employe who voluntarily incurs known danger. He must use due care and caution to avoid the injury. If he has knowledge of all the perils of a particular service, he may decline to engage in it or require that it first be made safe; but if he does enter into it, he assumes the risks and bears the consequences. *Pa. Co. v. Lynch*, 90 Ill. 333; *C. C. & I. Ry. Co. v. Troesch*, 68 Ill. 552; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Honner v. Ill. Cent.*, 15 Ill. 550; *Ill. Cent. v. Jewell*, 46 Ill. 99; *Sack v. Dolese (Ill.)*, 27 N. E. R. 62.

That a servant can not recover of his master when his own want of care contributed to the injury, or by the exercise of ordinary care he might have avoided it, may now be regarded as a rule of law completely established. *I. C. R. R. v. Patterson*, 69 Ill. 650; *T. W. & W. Ry. Co. v. Asbury*, 84 Ill. 430; *T. W. & W. Ry. v. Black*, 88 Ill. 112; *Austin v. C., R. I. & P. R. R.*, 91 Ill. 35.

Where a servant is injured, either through the carelessness or incompetency of a fellow-servant, or through any defective machinery furnished, and had the same knowledge or means of knowledge, as the master, he can not maintain an action for such injury, but will be held to have assumed such risk. *Pierce on Railroads*, 379 and 380; *T. W. & W. Ry. v. Black*, 88 Ill. 112; *T. W. & W. Co. v. Asbury*, 84 Ill. 430.

APPELLEE'S BRIEF, MUNDY & ORGAN, ATTORNEYS.

It was the duty of the appellant to furnish its brakemen with suitable cars and machinery for the business in hand and to use reasonable diligence in seeing that it was in repair. *C. & N. W. R. R. Co. v. Swett, Adm'r*, 45 Ill. 197; *Chicago & N. W. R. R. Co. v. Jackson*, 55 Ill. 492; *T. W. & W. Ry. Co. v. Fredericks*, 71 Ill. 294; *T. W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309; *C., B. & Q. R. R. Co. v. Avery*, 8 Brad. 133; *C. & E. I. R. R. Co. v. Hagar*, 11 Brad. 498; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240.

The defect was, under the holdings of our courts, a patent

defect, for the reason that the appellant should have known that it existed, it only requiring reasonable diligence to look under the car and discover it; the car stood eleven days on the track at that place before the injury, during which time the appellant had ample time and opportunity to inspect it, and is charged with the duty. *Chicago & N. W. R. R. Co. v. Jackson*, 55 Ill. 492.

OPINION OF THE COURT, SAMPLE, J.

The appellee's counsel does not insist that the appellant was negligent in furnishing cars with deadwoods, or with Ames' couplers. Nor is such negligence based on furnishing a car with a broken lever or chain; but the counsel say: "Plaintiff claims that the looseness of the draw bars, allowing it to recede sooner, and a greater distance than it could or would, had it been in repair, allowing the bull tongue to shy the pin in an unusual and unexpected manner, caught his fingers when he was not expecting such occurrence."

The injury can not be attributed to the receding of the draw bar of either car a greater distance than usual, for the reason that there is no evidence to sustain that theory. All of the evidence shows that the draw bars were constructed so that they would recede and permit the force of the concussion of the cars, as they came together, to be sustained by the deadwoods. That is the only purpose of the deadwoods. They are intended to receive the force of the concussion, and thus relieve and preserve the draw bars from being broken. In such case, the draw bars of cars having deadwoods can not recede, or at least in this case the evidence does not show that they did recede further than was necessary for the deadwoods to receive the force of the shock of the cars as they came together.

The evidence is not that the draw heads receded too far, but that the draw head of the right or still car pulled out too far, as shown by the evidence of the plaintiff above quoted.

He testified as follows: "This draw head to my right

(meaning the draw head of the still car) certainly must have been out of order, for there was a great deal of loose motion there. It pulled out at least nine or ten inches. Most generally it pulls out three or four inches." It will be observed that he does not pretend to state how far the draw bars receded, or that either of them receded farther than usual. How the pulling out of the draw bars of the cars, or either of them, could have caused or contributed to this injury, we are unable to understand.

The pulling out of the draw head of the right car occurred on the reaction, after the cars had come together. Before that time, according to the plaintiff's testimony, his fingers had been caught as heretofore described. Even if the draw bar had receded farther than usual, we are at a loss to understand how that could have caused appellee's injury. Why should such receding cause the pin to be forced or canted over, so as to catch the appellee's hands? As a cause, the receding would naturally have the opposite effect.

The bull tongue was in the left, or moving car; the pin, of which appellee had hold, was in the hole of the draw head of the right or still car, with the lower end projecting into the aperture of that draw head. The bull tongue being fastened, was stiff—therein differing from a link—and when it struck the lower end of the pin, the canting or shying would naturally occur, and the receding of the draw head could not, as a cause, have operated to produce it.

It was incumbent on the appellee to prove, not only a defect in the coupler, but the defect that caused the injury. Merely proving that there was a defect, is not sufficient. Not only so, but under the averments of the declaration, the proof must also show that the defect causing the injury was known to the defendant, or by the exercise of reasonable care, it could have been known. There is an absence of proof as to when the defect, if it can be so called, in the spring or following plate, mentioned by the appellee, occurred, or that appellant knew, or could have known by

the exercise of reasonable diligence, of such defect, even, if it is assumed such defect was the cause of the injury.

The fourth and sixth instructions given for the appellee, are erroneous. As heretofore stated, the declaration charges negligence in "not keeping the cars and machinery thereof in good repair, but on the contrary, the couplers were out of repair, and not sufficient for the purpose used."

The fourth instruction is as follows:

"The jury are instructed that a master or employer is bound to use reasonable care, skill and judgment, to furnish suitable machinery and implements properly constructed, and ordinarily skillful and trustworthy agents and workmen, and if the employer does not use such care, skill and judgment, and injury results therefrom to an employe, the employer will be liable for such injury unless the party injured knew of such defect long enough to have made complaint and did not make such complaint."

The cause of action is want of repair and notice of such condition. This instruction makes liability depend on the furnishing of machinery properly constructed, which was not made an issue in the case either by the pleadings or the evidence.

Notice is not necessary in case of an improper construction of machinery, but is, in case of defect by use or for want of repair.

The sixth instruction is as follows:

"The court instructs the jury in this case, that if you believe from the preponderance of the evidence that the plaintiff, while in the exercise of reasonable care himself, was injured while attempting to make a coupling, and that said injury was caused by reason of the couplers, the machinery connected therewith being out of repair, then the jury should find for the plaintiff."

This instruction also ignores the law of notice as above laid down, and makes the liability depend solely on there being a defect at the time of the injury, and such defect being the cause thereof, without reference to when the defect occurred, or that by the exercise of reasonable care it would

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have been discovered by appellant before the injury. *E. St. L. P. & P. Co. v. Hightower*, 92 Ill. at p. 141.

It is also subject to the criticism that apparently it assumes that the machinery connected with the couplers was out of repair.

We do not deem it necessary to consider the other points made by appellant's counsel.

In view of our holding that the appellee did not make a case in the court below, entitling him to a verdict or judgment, we reverse, without remanding this cause, and make a finding of facts a part of our final order.

FINDING OF FACTS.

That John H. Dixon—the appellee—was injured while in the employ of the appellant and in the line of duty, in attempting to make a coupling of cars that were supplied with the Ames coupler—commonly called bull tongue coupler—both couplers on the cars being at the time defective, which was known to appellee, but for which defect so known there is no claim for a recovery in this case, the recovery being based on the loose motion of one of the draw bars, which in that respect was claimed to be defective but which we find did not cause or contribute to the injury, even if defective in the respect claimed. We find there is no proof of a defect in the couplers of the cars, that caused the injury.

The clerk will enter this in the final order.

City of Belleville v. I. & St. L. R. R. Co. et al.

1. *Appeal—Franchise Involved.*—A bill in chancery praying that in case the defendant, a railroad company, had conveyed its property to a consolidated company, which was shown to be the case, then, that such deed, on the hearing, be set aside, involves a franchise and therefore no appeal lies to this court.

2. *Railroads—Consolidations—Franchise.*—Where it appears that from the time the articles of consolidation are filed with the Secretary of

State, a railroad company has been, in form and as a matter of fact, a component part of the consolidated company, and has been in constant operation as a corporation, the effect of the articles of consolidation is, if authorized, to create a new corporation *de jure*. If the incorporation is irregular, it becomes a corporation *de facto*. In either view a franchise is involved.

Memorandum.—Bill for injunction and relief. Appeal from a decree of dismissal rendered by the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1892, and dismissed for want of jurisdiction. Opinion filed September 8, 1893.

The opinion of the court states the case.

E. L. THOMAS and JAMES M. HAY, attorneys for appellant.

APPELLEES' BRIEF G. & G. A. KOERNER, ATTORNEYS.

This cause involves a franchise, and nothing else. The prayer of the bill is that the consolidation of the Illinois & St. Louis Railroad & Coal Company with the Louisville & Evansville & St. Louis Railroad, and other railroad companies, be restrained, or, if effected, be set aside. Should this prayer in either form be granted, the Louisville, Evansville & St. Louis Consolidated Railroad Company, which for some two years now has operated and is operating a railroad line from St. Louis and Louisville, will have no franchise, no existence.

The statute creating this court has withheld from it jurisdiction in cases involving franchises. Appeals in such cases go to the Supreme Court direct. Therefore, the appeal, it seems clear, should be dismissed for want of jurisdiction. It is not requisite that a formal motion to that effect should be made. Whenever in the course of litigation it appears that the court, where a cause is pending, has no jurisdiction, the court will refuse to proceed. Rev. Stat. Ch. 37, Sec. 28; Practice Act, Sec. 89 (Starr & Curtis); Coal, etc. Co. v. Edwards, 103 Ill. 476.

OPINION OF THE COURT, SAMPLE, J.

The appellant being the alleged owner of \$25,000 of stock

in the company of appellee, the same having been subscribed in the year 1870, filed its bill to enjoin the consolidation of appellee's road with three other certain railroads, making appellee the only party defendant. The article of consolidation was signed by the respective railroad companies before the bill was filed in the Circuit Court, at which time, however, the article had not been filed with the Secretary of State as provided by law. It was filed there the next day after the filing of the bill.

No writ of injunction was granted and none applied for so far as disclosed by this record.

The bill prayed that in case the appellee had conveyed its property to the consolidated company, then such deed, on the hearing, should be set aside.

On hearing, the bill was dismissed and this appeal taken.

The facts relating to the merits of this controversy have not been stated, for the reason the point is made by appellee that a franchise is involved, and therefore this court can not take jurisdiction.

It appears that, from the 22d day of May, 1889, when the article of consolidation was filed with the Secretary of State, the appellee has been in form, and as a matter of fact, a component part of the Louisville, Evansville and St. Louis Consolidated Railroad Company, the name taken by said roads after such consolidation, which road has been in constant operation as a corporation.

The effect of the article of consolidation was, if authorized, to create a new corporation *de jure*. O. & M. R. R. Co. v. People, etc., 123 Ill. 467.

If the incorporation was irregular under the proof, it became a corporation *de facto*. In either view, it seems to us a franchise is involved. The necessary result of sustaining the bill is to destroy the corporate, or assumed corporate existence of the Louisville, Evansville and St. Louis Consolidated Railroad Company, and without its being made a party defendant. Not being a party defendant, it was not affected by the filing of the bill, before the filing of the article of consolidation; neither was the appellee affected thereby, so far as its merger into said corporation

is concerned, for the reason that the conveyance to such consolidated company was made before the bill was filed, and as to it, or any action it could take, the consolidation had been consummated. For the reason stated, the appeal is dismissed with leave to appellant, if desired, to withdraw record, abstracts and briefs, from the files.

Kelley v. Louisville & N. R. R. Co.

1. *Instructions—Must be Accurate Where the Evidence is Conflicting.*—In an action where the contention on the questions of fact was as to whether the plaintiff had been paid for all services rendered by him, and whether he had been discharged without cause before the expiration of the time for which he was employed, and if so whether he might have obtained employment, and on most, if not all, of these questions the evidence was conflicting, *it was held*, that in this condition of the evidence the instructions must be accurate. So an instruction for the defendant stating that “if the plaintiff was employed to work for the defendant by the month and it has paid him in full all it owed him” the jury must find for the defendant, is erroneous because it ignores the question as to whether a contract had been made for any definite length of time, and the plaintiff discharged without cause.

2. *Instruction—Province of the Jury to Determine the Credibility of the Witnesses.*—It is the province of the jury to determine the credibility of the witnesses, and an instruction which takes from them the right of weighing the testimony is erroneous.

3. *Contract of Hiring—Rule in Case of a Breach.*—The rule in a suit for a breach of contract for hiring as to the amount of recovery, is the wages agreed to be paid by the contract, and the burden of showing what the plaintiff did earn or could have earned by reasonable diligence in other employment in case of his discharge before the expiration of the time fixed by the contract, is upon the defendant.

Memorandum—Action upon an oral contract. Appeal from a judgment rendered by the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge. Heard in this court at the August term, A. D. 1892. Opinion filed September 8, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF, BLAIR & LEONARD, ATTORNEYS.

A conflict in the evidence requires the instructions to be accurate. If liable to mislead, the judgment will be reversed.

Kelley v. L. & N. R. R. Co.

St. Louis Coal R. R. Co. v. Moore, 14 Brad. 510; Wabash & St. L. R. R. v. Shacklet, 105 Ill. 364; Michael's B. L. Co. v. Jenks, 20 Brad. 369.

APPELLEE'S BRIEF, J. M. HAMILL, ATTORNEY.

Where the parties have made an express contract no contract will be implied, and the action must be upon the express contract and the recovery under its terms. And no recovery on the *quantum meruit* is authorized or can be sustained. Walker v. Brown, 28 Ill. 378; Ford v. McVay, 55 Ill. 119; Illingsworth v. Slossom, 19 Brad. 612.

OPINION OF THE COURT, PHILLIPS, P. J.

This is an action of assumpsit brought by plaintiff against defendant for a breach of an oral contract.

The declaration contains a special count alleging that the defendant employed the plaintiff to work for it for three years as superintendent of track at \$100 per month, payable monthly, and the expense of moving his family from Mt. Vernon, Illinois, to the place he was to work in West Virginia, which was alleged to have been \$400, and it is further averred that plaintiff in pursuance of the contract entered into the service of the defendant and remained for about eight months, when defendant, without cause, discharged him from its service, and since which time the plaintiff has been idle, although he has diligently sought employment. A recovery is sought for wages earned and for eight months lost time on the contract of employment, consequent on the discharge, and for money paid, laid out, and expended. There are also the common counts. To this declaration the general issue *only* was pleaded.

The plaintiff claims that for all services rendered by him for labor, he was paid all that was owing, except \$20, for which a check was offered him and refused, he demanding more money. He further says that he paid out \$34.93 in money for defendant, in repairing tools and in railroad fare, endeavoring to find men to work for the defendant, and that he was ready and willing to comply with the contract to

work. The contention on the question of fact was as to whether the plaintiff had been paid for all services rendered by him, and whether he had been discharged without cause before the expiration of the time for which he was employed, and if so, whether he might have obtained employment. On most, if not all of these questions, the evidence was conflicting, and hence, in that condition of the evidence the instructions must be accurate. The first instruction given for the defendant is as follows: "If plaintiff was employed to work for defendant by the month and it has paid him in full all it owed him, then you must find for defendant." This instruction ignores the question as to whether a contract had been made for any definite length of time and the plaintiff discharged without cause, and also ignores the question as to whether money had been advanced by plaintiff for the use of defendant, and in this respect it was erroneous. And the third, fourth and fifth instructions given for the defendant also disregard the question of money advanced by the plaintiff for defendant's use. The sixth instruction is: "If the jury believe, from the evidence, that at the time plaintiff was employed to work for the defendant the only persons present were O'Brien, Crane and plaintiff, and O'Brien and Crane have testified that plaintiff was employed by the month and not by the year, and that O'Brien and Crane are creditable witnesses, and their testimony has not been successfully contradicted or impeached, and that the defendant has paid the plaintiff in full all that it owed him, then your verdict must be for the defendant."

This instruction takes from the jury the right of weighing the testimony that was conflicting on this subject, and by the court the credibility of the witnesses is determined, which was the province of the jury. The instruction in this regard is erroneous. *Frame v. Badge*, 79 Ill. 441; *C., M. & St. P. Ry. Co. v. Hall*, 90 Ill. 42; *Protection Life Insurance Co. v. Dill*, 91 Ill. 174.

The eighth instruction given for the defendant is as follows: "Even if you should believe from the evidence that

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defendant employed the plaintiff for a certain period and discharged him without cause before the expiration of such period, still if you further believe from the evidence the plaintiff has not made proper and diligent efforts to obtain other employment, or if from habits of drunkenness or neglect, he has been unable to obtain such employment, then he can not recover from the defendant for the time that has elapsed since his discharge to the commencement of this suit, and your verdict must be for the defendant." The rule in a suit for a breach of contract for hiring, as to the amount of recovery, is the wages agreed to be paid by the contract; and the burden of showing what the plaintiff did earn, or could earn by reasonable diligence in other employment, is thrown upon the defendant. *Brown v. Board of Education*, 29 Ill. App. 572, and cases cited. The instruction as given to the jury made the right of recovery depend on whether reasonable diligence was used to obtain other employment, regardless of what might have been earned, which must be shown by the defendant. The evidence in this case is conflicting, and where the evidence is conflicting and contradictory, the instructions must be accurate. *St. Louis Coal R. Co. v. Moore*, 14 Brad. 510; *Wabash, St. Louis R. R. v. Schacklet*, 105 Ill. 364; *Michael's B. & L. Co. v. Jenks*, 20 Brad. 369. For errors in instructions, the judgment must be reversed and the cause remanded.

Titsworth v. Cook et al.

1. *Injunctions—Levy of Execution.*—Where a person seeks to enjoin the levy of an execution, and to prevent future complications by declaring the judgment upon which it is issued null and void, it is necessary to show that such person has some property which could be seized upon such execution, or subjected to the lien of the judgment.

Memorandum.—Bill for an injunction. Writ of error to the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, A. D. 1892, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

GEORGE B. LEONARD, attorney for plaintiff.

DEFENDANTS' BRIEF, C. H. BURTON, ATTORNEY.

There is no evidence of any character that plaintiff owns lot five or any lot, or that she is in possession of the same, and hence the bill was properly dismissed. The allegations in a bill and the proof must correspond. *Reed v. Reed*, 135 Ill. 485.

A bill to remove a cloud from the title to real estate can be maintained only where the land in controversy is improved or occupied or unimproved or unoccupied. *Hurd's Statute 1891, Sec. 50, Chancery (Act of 1869); Hardin v. Jones*, 86 Ill. 313; *Gage v. Abbott*, 99 Ill. 366; *Gage v. Curtis et al.*, 122 Ill. 526. In *Glos v. Randolph*, 133 Ill. 198, the court held that an allegation in a bill to remove a cloud from title, that the premises are vacant and unoccupied, is material, and in the absence of proof thereof, the bill should be dismissed.

OPINION OF THE COURT, SCOFIELD, J.

C. D. Cook, for the use of J. G. Vaughn, sued Lettie A. Titsworth, plaintiff in error, and August C. Klein, before J. R. Satterfield, a justice of the peace of Jefferson County. The summons was returnable on February 4, 1884. Klein was not served, and plaintiff in error contends that she was not served with process. Neither of the defendants appearing on the return day of the summons, judgment was rendered against plaintiff in error for \$59.05, and the cause was continued with *scire facias*, as to defendant Klein. On February 26, 1884, an execution was issued on the said judgment and delivered to C. C. Satterfield, a constable of the county, who, on April 5th following, returned the same unsatisfied. On April 18, 1889, more than five years thereafter, a transcript of this judgment was filed in the office of the clerk of the Circuit Court of Jefferson County, and on

the same day the judgment was duly assigned to William S. Davis. On June 9, 1890, an execution was issued on the judgment and placed in the hands of the sheriff of the county, but before any levy had been made thereunder. plaintiff in error filed her bill in the Jefferson Circuit Court, to enjoin the levy of the execution, and to have the judgment on which it was issued set aside, and declared to be null and void.

Defendants in error answered the bill denying every allegation thereof.

The hearing of the case in the Circuit Court on exceptions to the report of the master in chancery, resulted in a decree dissolving the temporary injunction which had been granted by the master, and dismissing the bill for want of equity. Upon proper suggestion made and evidence heard, the damages of defendants in error were assessed at \$20 on the dissolution of the injunction.

The judgment of the justice of the peace was rendered on what purported to be a promissory note signed by Klein and plaintiff in error. The latter alleged in her bill, and sought to prove, that she did not execute the note. She also alleged and sought to prove that she was not served with summons, and had no notice of the suit or judgment till after the filing of the transcript in the circuit clerk's office. We think she failed to establish either of these allegations by the evidence. But it is insisted that the judgment of the justice of the peace was barred by the statute of limitations before the transcript thereof was filed in the circuit clerk's office, and that a court of equity should enjoin the levy of the execution in question, and prevent future complication by declaring the judgment itself to be null and void. A sufficient answer to this proposition is the fact that the plaintiff in error has not shown that she has property that could be seized upon execution, or subjected to the lien of a judgment. She alleges in her bill both ownership and possession of lot five in Williams' survey of the city of Mt. Vernon, in Jefferson County. She does not aver in her bill that she owns any other property

whatsoever. When we turn to the evidence we find the allegations of ownership and possession of the lot in question utterly unsupported by proof. During the course of her testimony, plaintiff in error used the words "my house" a few times, without giving the description or showing location thereof. She states that she has inherited a very little property from her father, but does not state whether it is real or personal. When asked whether or not she has more property than she can hold under the exemption laws, she answers: "I suppose I have. I do not know, though."

These indefinite answers are not sufficient to show that she owns any property subject to execution, and wholly fail to show ownership or possession of the particular lot described in the bill. Inasmuch as she can not make one case by her bill and another by her proofs, she is certainly entitled to no relief in the case presented by this record. *Purdy v. Hall et al.*, 134 Ill. 298; *Coale v. Moline Plow Co. et al.*, Id. 350; *Read et al. v. Read et al.*, 135 Id. 482. If the bill is to be treated as a bill to remove a cloud from the title of plaintiff in error to lot five above mentioned, she must allege and prove possession of the lot, unless the same is vacant and unoccupied. She has alleged possession but has not proved it. She has not even shown ownership in law or equity with right to the possession. She is entitled to no relief on this ground. *Hardin v. Jones*, 86 Ill. 313; *Gage v. Abbott*, 99 Id. 366; *Gage v. Curtis et al.*, 122 Id. 526; *Glos et al. v. Randolph*, 133 Id. 197. We hold, also, that damages were properly allowed on the dissolution of the injunction.

The decree of the Circuit Court is affirmed.

East St. Louis Electric Street Railroad Company v. Cauley.

1. *Bill of Exceptions—Exceptions to a Motion for a New Trial.*—A motion for a new trial and the exception to the action of the court in overruling the same must be made to appear by the bill of exceptions. A statement thereof by the clerk in the judgment order is utterly value-

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E. St. L. Electric St. R. R. Co. v. Cauley.

less. So, no exception to the action of the court in overruling a motion for a new trial is shown by the following statement in the bill of exceptions: "But the court overruled the motion (for a new trial) and rendered a judgment in accordance with the finding of the jury, to the rendition of which judgment the defendant then and there excepted."

2. *Practice—Exceptions.—Directing Motion for New Trial—Rendition of Judgment.*—The order overruling a motion for a new trial and the rendition of the judgment on the verdict are separate acts, and the fact that the two orders are in juxtaposition does not make them one and the same. If a party to a suit is displeased because his motion for a new trial is overruled he should except to the decision of the court in overruling it and not to the rendition of the judgment.

3. *Bill of Exceptions a Pleading.*—A bill of exceptions is the pleading of the party alleging the exception, and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be construed most strongly against the party preparing it.

4. *Practice—Error Must be Made to Appear.*—If a litigant allege an error, he must not only make the error appear, but he must show himself in a position to take advantage of it.

5. *Practice—Exceptions Must be Taken in Apt Time.*—The reasons filed in support of a motion for a new trial may allege error in admitting or excluding evidence, and in giving or refusing instructions, but such errors can not be considered by the Appellate Court, unless the record shows that such exceptions to the ruling of the trial court were taken at the time when the evidence was admitted or excluded, or when the instructions were given or refused.

Memorandum.—Appeal from a judgment rendered by the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the February term, 1893, and affirmed. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

COCKRELL & MOYERS, attorneys for appellant.

APPELLEE'S BRIEF, JESSE M. FREELS AND A. R. TAYLOR,
ATTORNEYS.

A party, to avail himself of an exception to a decision of the trial court, must take the exception at the time the decision is made, and the bill of exceptions must affirmatively show that it was taken at that time. *Dickhut v. Durrell*, 11 Ill. 84; *Allen v. Payne*, 45 Ill. 339; *Winslow v. Newlan*, 45 Ill. 147; *Dietrich v. Waldron*, 90 Ill. 115; *Nathan*

v. Bloomington, 46 Ill. 347; T., P. & W. R. Co. v. Miller, 55 Ill. 448; Ritchey v. West, 23 Ill. 385; Hake v. Strubel, 121 Ill. 326; Parsons v. Evans, 17 Ill. 238; Swafford v. Dovenor, 1 Scam. 167; Pomeroy, etc. v. Bank of Ind., 1 Wal. 598.

The exception, to avail, must immediately follow the decision, and must be to the specific ruling. Elliott's Appellate Procedure, Secs. 786, 787.

Exceptions are not to be taken in gross to several rulings; the exception must be taken to each ruling as it arises on the trial. Johnson v. McColloch, 89 Ind. 273; Johnston v. Jones, 1 Black, 220; Dickhut v. Durrell, 11 Ill. 84.

They must be taken to each ruling separately. Walter v. Walter, 117 Ind. 249.

An exception to a ruling upon a motion for a new trial is as essential as to any other ruling. Elliott's App. Proced., Sec. 795.

And where error is assigned to the overruling of appellant's motion for a new trial, and the record fails to show an exception thereto, no question is presented to, or before the Appellate Court. Mansur v. Churchman, 84 Ind. 573; Henley v. McNoun, 76 Ind. 380.

The bill of exceptions is the pleading of the party alleging the exception, and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be considered most strongly against the party who prepared it. Rogers v. Hall, 3 Scam. 6; Garrity v. Hamburger Co., 136 Ill. 514.

If it fails to show that any exception was taken to the decision of the court overruling the motion for a new trial, that decision can not be assigned for error, and the Appellate Court can not inquire into the questions attempted to be raised, or question the sufficiency of the evidence to sustain the verdict. St. L., A. & T. H. R. Co. v. Dorsey, 68 Ill. 327; Steffy v. The People, 130 Ill. 101, 102; Reichwald v. Gaylord, 73 Ill. 505; Graham v. The People, 115 Ill. 569, 570; Cline v. T., St. L. & K. C. R. Co., 41 Ill. App. 517; Pottle v. McWorter, 13 Ill. 455; Miller v. Dobson, 1 Gilm. 572; Smith v. Kahill, 17 Ill. 69; Alley v. Limbert, 35 Ill.

App. 593; McClurkin v. Ewing, 42 Ill. 285; James v. Dexter, 113 Ill. 654; Firemen's Ins. Co. v. Peck, 126 Ill. 494.

OPINION OF THE COURT, SCOFIELD, J.

It is asserted, in appellee's brief, that no exception has been preserved by appellant to any ruling of the city court, except as to the rendition of the judgment. We have examined the record carefully and have found this statement to be absolutely true. There is no exception on the part of the appellant to any ruling of the court in admitting or excluding evidence, or in giving or refusing instructions. Neither is there any properly preserved exception to the ruling of the court in disallowing the motion for a new trial.

It has been repeatedly held that the motion for a new trial and the exception to the action of the court in overruling the same must be made to appear by bill of exceptions and that the statement thereof by the clerk in the judgment order is utterly valueless. James v. Dexter et al., 113 Ill. 654; Graham et al. v. The People, 115 Id. 566; The Firemen's Insurance Company v. Peck, 126 Id. 493; Steffy v. The People, 130 Id. 98.

The only semblance of an exception on the part of appellant to be found in the bill of exceptions is as follows:

"But the court overruled the motion (for a new trial) and rendered a judgment in accordance with the finding of the jury, to the rendition of which judgment the defendant then and there excepted."

Now the order overruling a motion for a new trial and the rendition of the judgment on the verdict are separate acts. The fact that the two orders are in juxtaposition does not make them one and the same. No motion for a new trial may be made, and yet a valid judgment may be rendered. If a party to a suit is displeased because his motion for a new trial is overruled he should except to the decision of the court in overruling his motion and not to the rendition of the judgment. The bill of exceptions is the pleading of the party alleging the exception, and, if liable to the charge of

ambiguity, uncertainty or omission, it ought, like any other pleading, to be construed most strongly against the party preparing it. Nothing is to be taken by intendment. If a litigant allege error he must not only make error to appear, but he must show himself in a position to take advantage of the fact. *Rogers v. Hall*, 3 Scam. 5; *Lee et al. v. Town of Mound Station*, 118 Ill. 304; *Garrity v. The Hamburger Co.*, 136 Id. 499; *Monroe v. Snow et al.*, 33 Ill. App. 230; *Alley v. Limbert*, 35 Id. 592.

In order to meet this unfortunate condition of the record, counsel for appellant boldly advance some novel propositions. They affirm that "an exception taken to the overruling of a motion for a new trial and the rendition of a judgment, preserves all of the questions set forth in the motion for a new trial." Such is not the fact in this case. As we have seen, no exception was taken to the action of the court in overruling the motion for a new trial. Such is not the law. The reasons filed in support of the motion for a new trial may allege error in admitting or excluding evidence and in giving or refusing instructions, and yet such error could not be considered by an appellate court, unless the record shows exceptions to the ruling of the trial court at the time when the evidence was admitted or excluded, or when the instructions were given or refused. *Hill v. Ward*, 2 Gilm. 285; *Dickhut v. Durrell*, 11 Ill. 72; *I. C. R. R. Co. v. Modglin*, 85 Ill. 481; *C. P. & St. L. Ry. Co. v. Wolf et al.*, 137 Ill. 360.

Another novel proposition is set forth in the following words: "For this cause on the part of the appellee the judgment should be reversed." The obnoxious course referred to consists in the citation of authorities to show that inasmuch as the bill of exceptions is practically a bill without exceptions, the judgment of the court below should be affirmed. In view of the fact that we agree with appellee on this point, we deem it hardly proper to punish him by reversing the judgment. The only question before us concerns the sufficiency of the judgment. No defect in the form of the judgment has been pointed out, nor has it been contended

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that in the absence of error the City Court could have done otherwise than render judgment on the verdict. The judgment is affirmed.

49	815
150	208

Savitz v. O. & M. Ry. Co.

1. *Railroads—Unlawful Discrimination.*—To maintain an action against a railroad under the provisions of Chap. 114, Revised Statutes of Illinois, for an unjust discrimination, it is necessary to prove that the company has violated the provisions of said statute, and is guilty of an unjust discrimination to the damage of the party bringing the action, in demanding, charging, collecting and receiving from him for the transportation and delivery of freight, a higher and greater rate of toll and compensation than it, at the same time, charged, demanded and received from others for the transportation and delivery of a like quantity of freight of the same class, from the same point, in the same direction, and over an equal distance of its railway.

2. *Railroads—What is an Unjust Discrimination.*—Where a railroad company fixed two rates on all coal transported over its road from points between ten and fifteen miles from the city of East St. Louis to said city, one at forty-five cents per ton, and one at thirty-one and a quarter cents per ton, and both rates were public and uniform, and open to all coal shippers alike, and that shippers knew at the time of shipments by them of the existence of such rates, and could have availed themselves of the lower rate if they had seen fit to do so, *it was held* that such rates did not amount to an unjust discrimination within the meaning of the statute.

Memorandum.—Action for unjust discrimination. Appeal from a judgment for the defendant rendered by the Circuit Court of Saint Clair County; the Hon. BENJAMIN R. BURROUGHS, Circuit Judge, presiding. Heard in this court at the August term, A. D. 1892, and affirmed. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, JOHN G. IRWIN AND CHARLES E. WISE,
ATTORNEYS.

At common law unjust discriminations are illegal, and all railroads in this State hold their charters under an implied

obligation to perform and fulfill this common law duty of exercising their franchises and privileges without injurious discriminations against any class of patrons, or in favor of any other class. *Vincent v. C. & A. R. R. Co.*, 49 Ill. 35; *The People v. C. & A. R. R. Co.*, 55 Ill. 111; *C. & N. W. R. R. Co. v. The People*, 56 Ill. 365; *C. & A. R. R. Co. v. The People*, 67 Ill. 19; *I. C. R. R. Co. v. The People*, 121 Ill. 310.

Discriminations made in good faith because of differences in expense of carriage, and proportioned with reference thereto, are just, and not within the purview of the statute. But it devolves upon the railroad company relying upon such facts as a defense to a suit for unjust discrimination, to prove them to the satisfaction of the court. *I. C. R. R. Co. v. The People*, 121 Ill. 318.

While mere inequality in charges does not, of itself, amount to unjust discrimination, it becomes such when a discrimination in rates is made for the transportation of goods of the same class for different shippers under like circumstances and conditions. *Hutchinson on Carriers*, Sec. 302; *Scofield v. Railway Co.*, 43 Ohio St. 571.

APPELLEE'S BRIEF, POLLARD & WERNER, ATTORNEYS.

This suit is based upon a penal statute, and all the rules applicable to the enforcement of penal statutes require that it should be made clearly to appear that the precise statutory offense has been committed. *C., B. & Q. R. R. Co. v. The People*, 77 Ill. 443; *Kankakee Coal Co. v. Ill. Cent. R. Co.*, 17 Brad. 614.

The issue is, was there an unjust discrimination? It must appear not only that the company made a discrimination in its rates, or charges of toll, but that such discrimination was an unjust discrimination; and the company can successfully defend by traversing the allegation that there was an unjust discrimination. *C. & A. R. Co. v. The People*, 67 Ill. 21; *St. L., A. & T. H. R. Co. v. Hill*, 11 Brad. 252; *Same v. Same*, 14 Brad. 587.

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OPINION OF THE COURT, PHILLIPS, P. J.

This is an action of assumpsit brought by plaintiff under the provisions of Chap. 114, Rev. Stat., and the declaration contains two counts. The first count avers that the plaintiff was the owner of a coal mine in the county of St. Clair, called the Union Mine, situated between ten and fifteen miles east of East St. Louis, and avers that the Consolidated Coal Co. was the owner of several mines known as the Garstide, Mentar and Alma mines, and that all of these mines are on the line of defendant's road, between ten and fifteen miles east of East St. Louis, and that the plaintiff's mine is nearest to such point, and avers further that a large quantity of coal was mined from these several mines and shipped to East St. Louis, between April 1, 1889, and January 1, 1891. Further alleges, the plaintiff was compelled to pay forty-five cents per ton for all coal carried from his mine, while the Consolidated Coal Co. paid but thirty-one and one-fourth cents per ton for the coal carried from its mines, and alleging the unjust discrimination was an injury to the plaintiff. Declaration also pleads the schedule as adopted by the railroad and warehouse commissioners, whereby the maximum rate of coal was fixed at fifty cents per ton within a distance of fifteen miles. The second count is substantially like the first except that it avers the Consolidated Coal Co., owned and operated a mine named the "Breese" mine, between thirty-five and forty miles from East St. Louis, and that the rate for the Breese mine was seventy-five cents, and the rate charged by defendant was thirty-seven and a half cents, and that the defendant hauled for the Consolidated Coal Co. to East St. Louis from said mine 14,000 tons of coal at thirty-seven and a half cents per ton, while the maximum rate as fixed by the railroad and warehouse commissioners was seventy-five cents per ton, and that the coal was hauled for the Consolidated Coal Co. at a proportionally less rate than demanded and received from plaintiff.

To the second count of the declaration a demurrer was sustained and a plea of general issue filed to the first count

and a trial before the court without a jury resulted in the finding and judgment for defendant. To maintain this action it was necessary to prove that defendant had violated the provisions of the said statute and was guilty of an unjust discrimination to the damage of plaintiff, in demanding, charging, collecting and receiving from plaintiff for the transportation and delivery of freight a higher and greater rate of toll and compensation than it, at the same time, charged, demanded and received from the Consolidated Coal Co. for the transportation and delivery of the like quantity of freight of the same class, from the same point, in the same direction, over an equal distance of its railway. It appears from the evidence that plaintiff, between the dates mentioned in said first count, shipped from his mine, over defendant's road, to be delivered in East St. Louis, large quantities of coal, and was charged by and paid to defendant for the transportation and delivery thereof forty-five cents per ton, and during the same period the Consolidated Coal Co. shipped from its said mines large quantities of coal over defendant's road, to be delivered in East St. Louis, and was charged by and paid to defendant for the transportation and delivery thereof, thirty-one and one-fourth cents per ton. The coal so shipped by plaintiff was what was known as commercial coal, and consisted of lump, nut coal, and sometimes slack, and was used by consumers generally. The coal so shipped by the Consolidated Coal Co., for the transportation and delivery of which thirty-one and one-quarter cents per ton was so paid, was known as railroad coal, which consisted of unscreened coal, the run of the mine, as it was termed by witnesses, and was furnished to and used by railroads exclusively.

The Consolidated Coal Co. also shipped from its mines during said period commercial coal over defendant's road to East St. Louis for the transportation and delivery of which it was charged by and paid defendant the same rate, forty-five cents per ton, as plaintiff paid defendant for the same service. Good reason appears for this difference in the rates charged for the transportation and delivery of the two classes of freight. Commercial coal was shipped by plaintiff

iff in small lots, averaging about two cars a day; these cars were put in a train of fifteen or twenty cars made up of cars from different mines loaded with commercial coal. These cars belonged to and were furnished by the defendant, and upon arrival at East St. Louis the train was broken up and the shipper designated the final destination he desired each car should be sent to. This involved much switching service, detention of defendant's cars for several days and loss of the use of them during such detention, and the wear and tear of cars belonging to defendant. The railroad coal was shipped to and used by railroads in Missouri and points west; was not sold on the market or used for domestic or manufacturing purposes. This class of coal was hauled in cars belonging to and furnished by the roads using it, and defendant was thus relieved of the duty of providing cars to carry such freight tendered it, and merely furnished the motive power and necessary train-men to transport the coal over its road to East St. Louis, in trains consisting of not less than twenty cars. On arrival there the entire train, intact, was delivered to connecting roads, and this delivery completed defendant's contract for carrying and delivering that class of freight. It was further shown that this rate of thirty-one and one-fourth cents per ton was the uniform, general and public rate that had been charged and collected for several years by defendant for carrying railroad coal from said mines to East St. Louis. Shippers of coal knew of this rate, and if they wished to do so could have had the benefit of it. We do not hold that the fact that railroad coal is shipped in trains composed of a large number of cars, and commercial coal is shipped in less quantities, and in trains with less number of cars, of itself cuts any figure in determining the question submitted to us. It also appears that during the two years in question the Consolidated Coal Co. shipped about 180,000 tons of commercial coal from its said mines over defendant's road to East St. Louis, and paid the rate of forty-five cents per ton for its transportation and delivery, while during the same period plaintiff shipped from his mine to the same destination over defendant's road

less than one-tenth that quantity of coal and was charged and paid no greater rate.

We are unable to discover in this record evidence of unjust discrimination to the damage of plaintiff as averred. The facts justified defendant in charging and receiving the higher rate for the transportation of and delivery of commercial coal in East St. Louis, and no discrimination in favor of the Consolidated Coal Company was made with regard to this class of freight, but said company was charged and paid the same rate that plaintiff paid for like service rendered by defendant. The less freight rate fixed for transporting and delivering railroad coal in East St. Louis, was also justified by the facts proven, and we fail to perceive how plaintiff could be injured by giving the Consolidated Coal Company the benefit of that rate. That class of coal was all shipped out of this State, and did not come in competition with the class of coal shipped by plaintiff, and he could have had the benefit of the same low rate if he desired to ship railroad coal over defendant's road from his mine to East St. Louis, subject to the same condition with respect to furnishing cars and mode of delivering them, that were imposed on the coal company, for like service. The propositions submitted on behalf of defendant were in harmony with our views expressed, and also expressed in *L. E. and St. L. Con. R. R. Co. v. Crown Coal Co.*, 43 Ill. App. 228, and were properly held to be the law by the trial court.

The judgment is affirmed.

Illinois Central R. R. Co. v. O'Keefe.

1. *Practice—When Errors Assigned Can Not be Considered.*—Where an appellant assigned four errors, namely, (1) the court erred in giving improper instructions for appellee; (2) the court erred in refusing to give proper instructions asked by appellant; (3) the court erred in overruling a motion for a new trial; (4) the court erred in rendering judgment for appellee; but the record contained no motion for a new trial, or decision of the court in overruling such motion, and no excep-

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151s	508
49	320
79	283

I. C. R. R. Co. v. O'Keefe.

tion thereto, *it was held*, that, in this state of the record, the court could not consider the errors assigned.

2. *Practice—Error in Giving and Refusing Instructions.*—A party to an action can not have a judgment against him reversed for error in giving or refusing instructions, unless he has made a proper motion for a new trial in the court below, and preserved the ruling of the court thereon with his exceptions in the record.

3. *Instructions—Duty of Trial Court.*—It is not the duty of the trial court upon its own motion, and without any request from the defeated party, to set aside the verdict and grant a new trial, because of errors in the instructions.

4. *Instructions—Waiver in Giving.*—If the defeated party does not ask the court for a new trial, such neglect will be treated as a waiver of error in giving or refusing instructions.

5. *Practice—Appellate Proceeding—Abstracts.*—Where an abstract contains the instructions given at the trial for one party, and does not contain the instructions given or refused for the other party, the Appellate Court can not pass upon alleged errors in giving and refusing instructions, because under certain circumstances, error in the instructions on one side may be cured by instructions on the other.

Memorandum.—Action on the case. Appeal from a judgment rendered by the Circuit Court of Union County; the Hon. JOSEPH P. ROBARTS, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893, and affirmed. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

GREEN & GILBERT, attorneys for appellant.

H. F. BUSSEY and WILLIAM A. SCHWARTZ, attorneys for appellee.

OPINION OF THE COURT, SCOFIELD, J.

The four assignments of error in this case are as follows:

1. The court erred in giving improper instructions for appellee.

2. The court erred in refusing to give proper instructions asked by appellant.

3. The court erred in overruling the motion for a new trial.

4. The court erred in rendering judgment for appellee.

After a careful examination of the record, we have reluctantly reached the conclusion that the foregoing assignments of error can not be considered on their merits, inasmuch as the bill of exceptions contains no motion for a new trial, no decision of the court in overruling such a motion, and no exception to such a decision. In view of the repeated decisions of the Supreme and Appellate Courts on the question, it seems clear that this imperfect condition of the record precludes a consideration of the third and fourth assignments of error. But what of the first and second assignments of error? May the appellant have the judgment reversed for error, if error there was, in giving and refusing instructions, notwithstanding its failure to ask the trial court for a new trial? Must a trial court of its own motion and without any request from the defeated party, set aside the verdict and grant a new trial because of error in the instructions? We think not. If the defeated party does not ask for a new trial, this neglect should be treated as a waiver of error in giving or refusing instructions. Otherwise we should have this strange condition of things. An appellate court doing something (granting a new trial) which the trial court was never requested to do. The judge who presides at the trial, who is harassed with a multitude of cares, may err in giving or refusing instructions, and yet he may be very desirous of doing exact justice, and anxious to correct his erroneous rulings. A motion for a new trial affords him an opportunity to review the case calmly and carefully and to set aside a verdict produced by his erroneous rulings, and that, too, without the expense involved in an appeal. If such a motion is not made the higher court should refuse to consider alleged errors in the charge to the jury. Among the cases bearing upon this question, we refer to *James v. Dexter et al.*, 113 Ill. 654, and *Martin et al. v. Foulk et al.*, 114 Ill. 206.

Another reason why we can not consider the first and second assignments of error, is to be found in the fact that the abstract which contains the instructions given at the request of appellee, does not even so much as mention the

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six instructions given, or the two refused on the other side. In *Joliet Street Railway Company v. McCarthy*, 42 Ill. App. 49, it was held that the court would not consider objections to a declaration which was not abstracted. In *McGillis et al. v. Anderson*, 44 Ill. App. 601, the court refused to consider the instructions, because they were not contained in the abstract. In *C. P. & St. L. Ry. Co. v. Wolf et al.*, 137 Ill. 360, it was held that an appellant's abstract, as against him, will be presumed to be sufficiently full and accurate to prevent all the errors relied upon for a reversal of the judgment. Under certain circumstances, error in the instructions on one side may be cured by instructions given on the other, and hence it is not sufficient to abstract the instructions on one side only. For this reason we can not pass upon the alleged errors in giving and refusing instructions. The judgment is affirmed.

Hollenberg et al. v. Tompkins.

1. *Trial by the Court—Exceptions to Ruling.*—Where a court, in trying a case without a jury, hears evidence subject to objections, an exception to the ruling of the court must be preserved in some appropriate manner before the Appellate Court can be called upon to review the decision.

2. *Trial by the Court—Objections—Exceptions and Propositions of Law—Powers of the Appellate Court.*—Where a case is tried by the court, and no exception is taken to any material ruling of the court in admitting evidence, or in hearing the same, subject to objection, and where no propositions of law are presented for the purpose of obtaining an expression of the views of the law entertained by the court, but an exception is taken to the finding of the court on the main question at issue, the Appellate Court can only inquire into the sufficiency of the evidence to support the finding and judgment.

3. *Tender of Amount Due and Costs.*—In an action upon an account the defendant tendered to the plaintiff the sum of fifty-one dollars and thirty-six cents, as the amount due and costs which had been made up to the time of the tender. On the trial the plaintiff recovered judgment against the defendant for fifty dollars and thirty-six cents, and costs

49 323
87 544

of suit. Upon appeal *it was held*, the tender having been kept good, it was sufficient, and that the judgment against the defendant for fifty-one dollars and thirty-six cents and for the costs was erroneous.

Memorandum.—Action upon an account. Appeal from a judgment rendered by the Circuit Court of Wayne County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, A. D. 1893. Opinion filed September 8, 1893.

The statement of the facts is contained in the opinion of the court.

CREIGHTON & KRAMER, attorneys for appellants.

BUNCH & BONHAM, attorneys for appellee.

OPINION OF THE COURT, SCOFIELD, J.

On January 10, 1891, Tompkins, the appellee, leased a certain "saw mill and feed meal mill thereto attached, with barn and houses," to Hollenberg and Meadley, the appellants, for the term of one year, at a rental of twenty dollars per month, payable in advance, and an additional rent of "twenty-five cents per thousand for all lumber sawed." By the terms of the lease, Tompkins sold to appellants such timber as they might select on certain lands belonging to him, which timber was to be sawn into lumber at said mill, and was to be paid for at the rate of one dollar per thousand feet, "with twenty-five cents for the use of the mill in sawing, the amount to be made up at the end of each month." The timber so cut was to be measured as the logs were hauled, and the measurements were to be "put upon a book or books kept for that purpose, and to be accounted for by Scribner's rule." Upon failure of the lessees to account and make payment promptly, the lessor was authorized to declare a forfeiture of the lease. On March 14th following, Tompkins sued appellants before a justice of the peace, for a balance alleged to be due him. On March 16th, appellants tendered him \$51.36, being \$41.86 for the balance, admitted by them to be due, and \$9.50 for the costs which had been made up to

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the time of the tender. The justice of the peace rendered judgment in favor of Tompkins for \$31.36, and ordered that appellants pay \$9.50 of the costs, and that appellee pay the remainder. From this judgment Tompkins took an appeal to the Circuit Court, where the case was tried without a jury, and a judgment was rendered against appellants for \$51.36 and costs of suit.

Appellants, having brought the case to this court for review, now urge a reversal of the judgment on the ground that their tender was sufficient, and that it was error for the Circuit Court to render a judgment against them for costs. This conclusion necessarily follows, if the premises on which it is based are sustained by the evidence. Where the court, in trying a case without a jury, hears evidence subject to objections, an exception to the ruling must be preserved in some appropriate manner before this court can be called upon to review the decision. *The People, for use, etc., v. McCoy*, 132 Ill. 138. No exception was taken by appellants to any material ruling of the court, either in admitting evidence or in hearing the same subject to objections. No propositions of law were presented for the purpose of obtaining an expression of the views of the law entertained by the court. Nothing remains for us to do, therefore, but to inquire into the sufficiency of the evidence to support the finding and judgment.

What amount of timber was cut by appellants on the lands described in the lease? This is the only controverted question of fact in the case. The evidence on the part of appellants fixes the amount at 64,262 feet. Is there any evidence in the record on the part of Tompkins which tends to show a greater quantity so as to raise a conflict of the evidence on this question? We have searched the record diligently and have found none. Samuel Palfreyman, railroad agent at Arrington station, whence the lumber was shipped, is the only witness who testified for appellee on the question, and at no point in his testimony did he undertake to make even an approximate estimate of the amount of lumber shipped. He presented a memorandum consisting

of items taken from the railroad books, showing the number of car loads of lumber and the total weight thereof, but the memorandum itself was not admitted in evidence, and therefore could not have been considered by the court. It is true that appellee's additional abstract shows that while the court in the first instance refused to admit the memorandum in evidence, further examination of the witness and maturer consideration of the question resulted in a different ruling. The reverse of this is true. The record should not be read from right to left, like a Hebrew manuscript. As is shown by page 22 of the record, the witness, Palfreyman, said, "I think this memorandum is taken from the books of the company, that is, the railroad company." Thereupon, appellants "objected to the slip of paper," and the "objection was overruled." But at the close of the examination of this witness, as appears from page 24 of the record, appellee offered the memorandum in evidence and appellants objected *and the objection was sustained*. There is nothing in the record which shows that this ruling was afterward reconsidered or modified. Appellee does not even call in question the correctness of the ruling by an assignment of cross-errors, which his exceptions duly preserved in the record would have enabled him to do. And so it appears that there is no evidence in the record which contradicts the evidence on the part of appellants as to the number of feet of timber cut by them on appellee's land. When the account is stated on this basis, the balance due appellee at the time of the tender was \$32.33. But the amount tendered was \$51.36. Under the admission of the parties the tender was "kept good," and the costs at the time of the tender amounted to but \$9.50. Thus it appears that the tender was sufficient, and that the judgment against appellants for \$51.36, and for costs, was erroneous. The judgment is reversed and the cause remanded.

Donnell Manufacturing Co. v. Jones.

1. *Bonds—Material Alterations—Duty of the Court to Instruct as to the Law.*—A person employed in the service of another, being required to give a bond for the faithful performance of certain services, wrote the bond himself, from a form furnished him by his employer, and took it away with him for the purpose of having it signed and acknowledged by his sureties, one of whom did not read the bond, or require it to be read, but inquired what it was intended to secure, and signed it after having been informed that it was only for the purpose of securing the return of a wagon, and implements which were furnished him by his employer for use in his business. Afterward said person delivered the bond to his employer. When delivered, the condition of the bond was, that he should take good care of the implements, wagon and other property furnished him, deliver up the same in good condition when called upon to do so, and promptly report, deliver and pay over to the obligee, all money, goods and other property received by him. Default having been made, an action was brought against the obligors. The defense was a denial of liability, on the ground of material alterations in the bond. On one hand the evidence tended to show that the penalty, both in words and figures, and perhaps the names of the sureties, were inserted in the bond after it was signed, and before delivery to the obligees. On the other hand, there was evidence tending to show that if the bond was altered after it was signed, it was while it was in the hands of the person so employed, and before the delivery to his employer, and without the latter's fault or knowledge. *It was held* in this state of the evidence, to be the duty of the court to instruct the jury upon the law, as to what was, and what was not, a material alteration sufficient to avoid the bond, and leave the jury to determine the facts from the evidence.

2. *Material Alterations—A Question for the Court—Instructions.*—In an action upon a bond, the defense was that of material alterations, and there was a conflict of evidence on the trial. An instruction which informed the jury that if the bond sued upon had been altered in a material point by the principal obligor, after the same had been signed by his sureties, and without their knowledge and consent, then such bond would cease to be binding upon the sureties, unless afterward ratified by them, is erroneous, because it makes the jury the judges of what constitutes a material alteration of the bond.

3. *Defenses—Action on Bonds—Filling Blanks.*—It is no defense to an action on a bond, that the names of the sureties and the amount of the penalty were inserted in the appropriate blanks by the principal obligator after the execution, before the delivery of the instrument and without the knowledge or fault of the obligee.

4. *Bonds Signed in Blank—Authority of Principal Obligee.*—If the surety upon an official bond relying upon the good faith of his principal

permits him to have possession of the bond signed in blank, such an act will clothe the principal with authority to fill up the blanks in any appropriate manner consistent with the nature of the obligation, so that, as against the obligee, receiving the bond without notice or negligence, and in good faith, the surety will be estopped to allege that he executed the instrument with a reservation, or upon condition, with reference to filling the blanks, and this, whether the blanks to be filled relate to the penalty, or the names of co-sureties. The liability of the surety in these cases is put upon the ground that he makes the principal make his agent to deliver the bond, and clothes him with apparent authority to fill up the bond, and to do any other acts which are necessary to make the instrument effectual for the purposes intended.

5. *The Rule Applies to Private as Well as Official Bonds.*—A bond without a penalty is valueless; therefore where a surety signs a bond in this condition he authorizes the principal intrusted with the delivery of it to insert the penalty in the appropriate blank. And if the obligee takes the bond without notice or negligence, the surety is bound. The reason of this rule applies to private as well as to official bonds.

6. *Of Two Innocent Parties Who Must Suffer.*—In a case where one of two innocent parties must suffer by the fraud or deceit of another, the loss should fall on him who put his trust and confidence in the deceiver.

7. *Affirmance—Under the Rule in the Rapp Case.*—Unless it appears from the record that the obligor has been released from his entire liability upon the bond under the rule of law laid down in the case of the estate of Michael Rapp v. The Phoenix Insurance Co., 113 Ill. 390, the judgment will not be affirmed.

Memorandum.—Action on a private bond. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Circuit Judge, presiding. Heard in this court at the February term, A. D. 1893. Opinion filed September 8, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, ALBERT WATSON, LEE McKEIGHAM,
AND ELLIS & PRIEST, ATTORNEYS.

It was proven by Jones and Sweeten that Fitts (whom Jones never saw before) told Jones the bond was only for the return of the wagon and samples; that Sweeten (whom Jones had known for twenty years) stood silent, neither reading nor offering to read or explain the contents of the paper to which his jurat was already affixed, and that Jones did not ask either of them to read it. Under such circumstances it becomes clearly material to know upon whom the

Donnell Mfg. Co. v. Jones.

loss should fall, resulting from a subsequent forgery in the bond by Fitts. It will be remembered that Fitts was not then in the employ of plaintiff; on the contrary, he was required to furnish the bond before being employed. He was therefore the agent of his sureties for the delivery of the bond, and they, and not the plaintiff, are responsible for such additions as may have been made to it without the knowledge or consent of plaintiff. *Graves v. Tucker*, 10 S. & M. (Miss.) 9; *Ladd v. Trustees*, 80 Ill. 233; *Griffith v. Reynolds*, 4 Gratt. (Va.) 46; *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326; *Casoni v. Jerome*, 58 N. Y. 315; *McWilliams v. Mason*, 31 N. Y. 294; *Booth v. Storrs*, 75 Ill. 438; *Craig v. Hobbs*, 44 Ind. 363; *Lucas v. Owens*, 113 Ind. 521; *Brandt on Suretyship and Guaranty*, Sec. 353 *et seq.*

APPELLEE'S BRIEF, C. H. PATTON AND WILLIAM H. GREEN,
ATTORNEYS.

Any alteration in a written contract which changes its terms, however slight, made by one party, without the consent of the other, will discharge the party or surety not agreeing to it. *Gardner v. Horback*, 21 Ill. 129; *Walters v. Short*, 5 Gil. 259. And this is so, even where the alteration is made by the principal after it is signed by the surety without the knowledge or consent of either the surety or the payee, and before delivery to the payee. For a precedent that fully covers this case see *Wood v. Steele*, 6 Wall. (U. S.) 80, and cases cited; *Pew v. Laughlin*, 3 Fed. Rep. 39.

It is conceded by counsel that all, or nearly all, of the several amounts alleged to have been collected by O. C. Fitts were collected by him after December 28, 1888, and that at that time he was a defaulter to the amount of \$130, "which he promised to pay at once or send in a note of the amount, signed by his bondsmen." "He sent in \$100, and the balance was never fixed." Here was a direct and positive notice that their agent was dishonest and a defaulter. He promised to have his bondsmen make good the deficit by giving their note for the amount due appellants from him

and good faith, "fair dealing and common honesty," demanded that they should have notified his bondsmen at once, and have discharged him from their services.

In the case of *Estate of Rapp v. Phenix Ins. Co.*, 113 Ill. 402, the Supreme Court say: "We are of opinion the court also ruled properly in refusing to allow appellees the amount of deficit for the month of February, not on the ground, however, that the bond had become *functus officio*, but because the company, in retaining in its services J. B. Booker & Co., after notice of the January default, which was just cause for discharging them, violated a duty which it impliedly assumed to Rapp and his legal representatives on accepting the bond. When the employer of a clerk or other agent takes from another a bond of indemnity, or other instrument, guaranteeing the honesty and fidelity of such clerk or agent while in the service of the employer, the latter impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at the employer's own risk. This is not only fair dealing and common honesty, but it is a rule of law also. The principle here announced is well established by the authorities." Citing *Phillips v. Foxall*, 27 L. T. (N. S.) 231-7, L. R. Q. B. 666; *Anderson v. Aston*, 28 L. T. (N. S.) 35, 8 L. R. Exch. 78.

Although appellants knew of the dishonesty of their agent, O. C. Fitts, they neither discharged him nor notified his bondsmen of that fact. Instead, they retained him in their services and permitted him to represent them until the middle or latter part of the following April, some three and a half to four months, during which time he never made a report or settlement, and he collected the amount involved in this suit. Such conduct on their part is not consistent with "fair dealing and common honesty" with the sureties. Had they discharged him promptly on the 28th day of December, 1888, no part of the claim of \$721.25 would have come into this dishonest agent's hands, and there could have been no loss. The rule that where one of two innocent par-

ties must suffer, the one in fault must bear the loss, would certainly place this alleged loss on appellant.

OPINION OF THE COURT, SCOFIELD, J.

The Donnell Manufacturing Company, appellant, vendor of grocers' and druggists' specialties, having its headquarters at St. Louis, Missouri, and doing business in many States, among them the State of Illinois, employed Oliver C. Fitts, in July, 1888, to sell its goods on commission and to collect its accounts in Southern Illinois. Before the contract of employment was made, Fitts was required to give bond for the faithful performance of certain obligations. He wrote the bond in appellant's office in St. Louis, copying it from a similar bond furnished him by the company's agent, and then took the instrument to Jefferson County, Illinois, for the purpose of having the same signed and acknowledged by his sureties. Appellee did not read the bond, or require it to be read, but inquired what it was intended to secure, and signed it after having been told that it was only for the purpose of securing the return of the wagon and samples which were to be furnished him by appellant for use in its business.

The bond was also signed by M. Fitts, the father of Oliver C. Fitts, and was thereupon taken by the latter to St. Louis and delivered to the company. The condition of the bond as delivered was, that Oliver C. Fitts should take good care of the samples and wagon and any other property furnished by appellant, and deliver up the same in good condition at any time when called upon by the company to do so, and promptly report, deliver and pay over to the company any and all moneys, goods or other property, received by him on account of said company. This action was brought against the obligors in the said bond for an alleged breach of the condition thereof. On the trial the suit was dismissed as to Mr. Fitts, who had died, and also as to Oliver C. Fitts, and was prosecuted against the appellee as sole defendant. The defense was a denial of liability on the ground of material alterations in the bond, and on the further ground of the

illegality of appellant's business, which was alleged to consist in part, of the unlawful sale of intoxicants in this State. The finding of the jury was for appellee, and from the judgment rendered on that verdict, the appellant has appealed to this court. The evidence tends to show that the bond was signed by James Jones with a lead pencil, and that afterward, and before the delivery of the instrument to appellant, and without the knowledge of Jones, his name was traced with ink over the lead pencil marks. The evidence also tends to show that the penalty, both in words and figures, and perhaps the names "James Jones," "Mr. Fitts" and "Jefferson County," were inserted in the bond after Jones had signed it and before delivery to the company. There were other slight alterations which need not be mentioned. But the most serious question arises from the conflict of the evidence with reference to the alleged alteration of the condition of the bond.

Appellee contends that the clause relating to reporting, delivering and paying over moneys, was inserted in the bond after he had executed it. He supports his affirmation by the testimony of Clark and Sweeten. On the other hand, appellant produces evidence which tends to show that if the bond was altered at all after Jones had signed it, this was done while the instrument was in the hands of Oliver C. Fitts, and before the delivery thereof to appellant, and without the latter's fault or knowledge. In view of the foregoing facts, we think the court erred in some of the instructions given at the request of appellee. These instructions are not numbered, either in the abstract or record, and therefore specific reference to them can not be conveniently made. It is sufficient to state, however, that at least three of the seven instructions given for appellee inform the jury that if the bond sued on was altered in a material point, by O. C. Fitts, after the same had been signed by appellee, and without appellee's knowledge or consent, then such bond ceased to be binding on appellee unless he afterward ratified the same. These instructions made the jury the judges of what would constitute a material alteration of the bond.

The jury might find that the penalty was inserted in the bond after the execution of the instrument, and they might call this a material alteration; or they might hold that the insertion of the name "James Jones" in the bond was a material alteration. This being true, the instructions referred to are erroneous, unless all of the alterations are material, so that any one of them, if proved, would, of itself, be sufficient for the avoidance of the bond. It is undoubtedly the law that it is no defense to an action on a bond that the names of the sureties and the amount of the penalty were inserted in the appropriate blanks in the bond by the principal obligor after the execution and before the delivery of the instrument without the knowledge or fault of the obligee. In *Stoner v. Millikin et al.*, 85 Ill. 218, it was held that where one, when asked to sign a note as surety, refused unless another should first execute the same, and the principal maker forged the name of such other person, and thereby induced the first to sign the note, and procured money of one who had no notice of the fraud, the fact of the forgery and fraud would not release the surety so executing the note. In *Stern et al. v. The People*, for use, etc., 102 Ill. 540, the law as above stated, was held to be applicable to sureties on official bonds. In *City of Chicago v. Gage et al.*, 95 Ill. 593, it was held that if the surety of an official bond, relying on the good faith of his principal, will permit him to have possession of the bond signed in blank, the surety will clothe the principal with apparent authority to fill up the blanks in any appropriate manner consistent with the nature of the obligation, so that as against the obligee receiving the bond without notice, or negligence, and in good faith, the surety will be estopped to allege that he executed the instrument with a reservation, or upon a condition with reference to the filling of the blanks, and this, whether the blanks to be filled relate to the penalty, or the names of co-sureties, or other thing. In the *Gage* case the surety signed the bond on the condition that the penalty should not exceed \$250,000, that the co-sureties should be satisfactory, and that he should be

permitted to determine whether he would "stand on the bond" or not at the time of the acknowledgment. He did not authorize any one to fill the blanks, he did not acknowledge the bond, he did not approve or ratify it afterward. The blank for the penalty was filled out with \$1,000,000 without his knowledge, and he was held liable on the bond for damages assessed at more than half a million dollars.

The liability of the surety in these cases is put upon the ground that he makes the principal maker his agent to deliver the bond, and clothes him with authority to fill up blanks, and to do any other acts which are necessary to make the instrument effectual for the purpose intended. A bond without a penalty is valueless; therefore, when a surety signs a bond in this condition, he authorizes the principal intrusted with the delivery of it to insert the penalty in the appropriate blank. If the obligee takes the bond without notice or negligence, the surety is bound. It is difficult to see how this rule of law can be limited in its operation to official bonds. The reason of the rule applies as well to private bonds. The Stoner and Stern cases cited above, show that as to the forgery of signature, the surety, who signs relying on the genuineness of the signature of a co-surety, is bound whether the bond be private or official. If this is the law, the act of filling blanks with the penalty and with the names of co-sureties, should not have a more prejudicial effect in one class of bonds than in the other. In any case one of two innocent persons must suffer by the fraud and deceit of another, and the loss should fall on him who puts trust and confidence in the deceiver. *Stoner v. Millikin et al., supra.* In any case the surety can put it beyond the power of the principal maker to perpetrate a wrong by filling the blanks himself, or having it done, before he signs the instrument. *City of Chicago v. Gage et al., supra.*

We are of the opinion, therefore, that the instructions which permitted the jury to determine what alterations were material, thereby conferring upon them the power to call that material which is immaterial in law, should not

have been given, and that the giving thereof is reversible error. It is urged, however, that, notwithstanding any errors appearing in the record, the judgment should be affirmed on the ground that appellee has been released from liability on the bond under the law as laid down in *Estate of Michael Rapp v. The Phoenix Insurance Company*, 113 Ill. 390, in which it was held that where the employer of a clerk or other agent takes from another a bond of indemnity, or an undertaking to become responsible for the honesty and fidelity of such clerk or agent in his service, the employer impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and if he retains him after such breach, the surety will not thereafter be liable. The evidence bearing upon this question shows that Oliver C. Fitts made a satisfactory settlement with appellant in September following his appointment. On December 28th he attempted to make another settlement, but was found to be indebted to the company in the sum of \$130 or more, for moneys belonging to the company which had been collected and used by him. He promised to send the money immediately, or to get a note signed by the bondsmen and "fix that matter up." Afterward he paid \$100, but the remainder was not paid and is included in the account sued on in this case. No notice of the defalcation was in any manner communicated to appellee, but Oliver C. Fitts was permitted to make collections for appellant till April, 1889, at which time he was indebted to appellant in the sum of \$721.25 for moneys collected, in addition to certain claims for damages to the wagon and samples. In view of these facts and others appearing in the record, we would affirm the judgment of the court below on the authority of the Rapp case, were it not for the fact that about \$30 of the amount sued for came into the hands of Oliver C. Fitts before the December settlement. Appellant could sue for this, as well as for a larger sum. The release arising under the authority of the Rapp case as applied to the record now before us can not be invoked by appellee for the affirmance

of the judgment inasmuch as it does not apply to the whole of appellant's claim. We deem it unnecessary to consider the other errors assigned. For the errors indicated the judgment of the Circuit Court is reversed and the cause is remanded.

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Webber et al. v. The Indiana National Bank.

1. *Practice in Appellate Courts—Instructions to be Printed in the Abstract.*—Where a part only of the instruction given on behalf of the defendants in error, and none of those given on behalf of the plaintiff are printed in the abstract, under the practice in this State, the court may refuse to consider the errors assigned on the instructions.

2. *Instructions as a Series—Notice to an Assignee of Commercial Paper.*—A series of instructions upon the question of notice to an assignee of commercial paper which assert the law on the subject to be, "Where the bill has passed to the plaintiff without any proof of bad faith in him, and there is no objection to his title, suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, it will not defeat his title; that result can only be produced by bad faith on his part," properly state the law.

3. *Commercial Paper—Rights of an Assignee.*—The duty of active inquiry does not rest on the purchaser of commercial paper, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence.

4. *Commercial Paper—Rights of an Assignee—The General Doctrine.*—It is clear, from the authorities, that the general doctrine of the law applicable to the purchaser of commercial paper, which is, that notice of facts which should excite inquiry in the minds of a reasonably prudent person, is notice of the ultimate fact which such inquiry would have disclosed, is not applicable to the assignment, before maturity, of such commercial paper as notes. They enter so largely, as a convenient medium, like money, into exchange or trade, stimulating business activity and sustaining, to a great extent, the commercial prosperity of a country, that public policy requires they shall be given almost the freedom of money in passing from hand to hand. Therefore notice of the ultimate act (and not merely notice of evidentiary facts, which should excite inquiry and which if pursued, would, by the exercise of diligence, lead to a knowledge of the ultimate fact,) is essential to be established, to impair the title of an assignee of a note, before maturity.

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5. *Commercial Paper—Purchaser Before Maturity—Notice.*—A speculative issue which is necessarily involved as to the diligence or negligence of an assignee, before maturity, of commercial paper, in following up or failing to follow up inferences suggested by evidentiary facts, will not be permitted.

6. *General Operation of the Rule.*—While the rigid rule of law applicable to the transfer of negotiable paper may, in isolated instances, work a hardship, yet in its general operation, the effect of the rule upon the business and property interests of the people, is largely beneficial in the increased value and use of such instruments, to those who make or hold them.

7. *Commercial Paper—Purchaser with Notice.*—A purchaser, before maturity, of commercial paper, who takes the same with a full knowledge of defenses, stands in no better situation than the person to whom such paper was originally made payable.

8. *Evidence—Evidentiary Facts—Evidence of the Ultimate Fact.*—Upon the issue of notice in the assignee of commercial paper, evidentiary facts may be shown for the purpose of proving the ultimate fact of notice of the defense; but such fact must be established, which, when done, constitutes bad faith of the assignee in the language of the law.

9. *Agency—Evidence of—Statements of the Agent.*—The declarations of an agent are not of themselves evidence of the fact of his agency.

10. *Notice to an Agent, Notice to his Principal.*—Notice to an agent of a fact within the scope of his agency is notice to his principal, yet such notice does not extend beyond the transaction covered by the agency.

Memorandum.—Action of assumpsit on promissory notes. Writ of error to the Circuit Court of St. Clair County, to reverse a judgment rendered therein; the Hon. GEORGE W. YOUNG, Judge. Heard in this court at the August term, A. D. 1891, and affirmed. Opinion filed September 8, 1893.

The opinion of the court states the case.

PLAINTIFF'S BRIEF, BOYER & CHOISSER, ATTORNEYS.

Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led; every unusual circumstance is ground of suspicion and prescribes inquiry. *Russell v. Ranson*, 76 Ill. 167; *Babcock et al. v. Lisk*, 57 Ill. 327; *Murray v. Beckwith*, 48 Ill. 391.

It makes no difference whether defendant in error had actual notice or not. Notice to its attorney was notice to it. *Williams v. Tatnall*, 29 Ill. 564.

DEFENDANT'S BRIEF, W. F. SCOTT AND PARISH & PARISH,
ATTORNEYS.

The party who takes commercial paper before due for a valuable consideration, without any knowledge of any defect of title and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. *Murray v. Lardner*, 2 Wall. (U. S.) 110; *Chapman v. Rose*, 56 N. Y. 137; *Magee v. Badger*, 34 N. Y. 247; *Shreeves v. Allen*, 79 Ill. 553; *Comstock v. Hannah*, 76 Ill. 530; *Goodman v. Harvey*, 4 A. & E. 870.

If Stanton was the attorney for the Nordyke & Marmon Co., and acting for it at the time he acquired the information he did from the Webbers, then, even had he afterward become the attorney of plaintiff, yet the latter would not be bound by any notice so received. *McCormick v. Wheeler, Mellick & Co.*, 36 Ill. 114, 121.

OPINION OF THE COURT, SAMPLE, J.

On the 21st day of June, 1887, the plaintiffs in error made a written contract with the Nordyke & Marmon Company to furnish certain milling machinery, use certain second-hand machinery of plaintiffs in error, and place the same in their mill in complete order, so that when operated by a competent miller, it should be capable of producing fifty barrels of flour of all grades in twenty-four hours, both in quality and yield, as good as any other mill in the State of Illinois using like grades of wheat, for the consideration of the sum of \$5,000, \$2,500 to be paid as the work progressed, and the balance to be evidenced by three notes for \$833, \$833 and \$834, due respectively, in six, twelve and eighteen months from their date, drawing seven per cent interest, secured by mortgage on the mill property. In a short time after the

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work was completed and the mill put in operation, on the 9th day of November, 1887, the three notes provided for in the contract were executed and delivered by the plaintiff in error to the Nordyke & Marmon Company, of Indianapolis, Indiana, which had business relations with "The Indiana National Bank," the defendant in error, of the same city.

Amos K. Hallowell, who was the financial and general manager of the Nordyke & Marmon Company, testified that the first and second of said notes were discounted to the Indiana National Bank, the first one on the 29th day of November, 1887, for \$833 and interest, the second one was discounted for the same amount, during his absence, on the 1st day of August, 1888, the net proceeds of which, on the same day, were entered to the credit of his company.

This was done in pursuance of an arrangement with the bank that it would discount the company's paper at any time it was in need of funds, and the notes were sent to the bank from time to time for that purpose, as the demands of the company required, which arrangement covered any and all of the company's paper that the bank might deem good. He further says that most of their paper was deposited with the bank as collateral security on money borrowed, and as the bank's vaults were safe places to keep their customer's paper, most of it was turned over to the bank in that way, largely as a measure of safety, and as he understands, these notes took that course, although he does not say when the bank first received possession of them, or what became of the third note, other than at the time of the discount, Arthur C. Newby, the bookkeeper of the company, testified that "the first note was given to me by Mr. Hallowell, and I was instructed to mark it as discounted, and we received credit from the bank for it. The other one, the second one—Mr. Hallowell being absent at the time—I consulted with Mr. Nordyke. We were in need of funds, and on the 1st of August, 1888, he told me to discount some of our paper, and I selected eight pieces of paper from our pocket-book—the book of notes, with a view to the

time it matured, and also to our future needs, and discounted them, for which we received a credit in our bank book of \$5,431.91 for the whole lot. I did not take the notes up in either case; they were sent by a messenger. On the 23d day of April, 1888, the defendant in error sent the first note to a bank at Harrisburg, Illinois, for collection, which was presented, and payment refused on the ground of a failure in the contract of warranty. The note was returned to defendant in error on the 13th day of June, 1888. From the 23d day of April, until the 13th day of June, the Harrisburg bank cashier claims the note was not out of his possession. About the last of April Mr. Stanton, an attorney, went to see plaintiffs in error, to settle up the whole matter of the difficulty about the mill as claimed by the plaintiffs in error, but no settlement was effected. It is claimed by the elder Webber that Stanton had two notes, although not certain of it, and by the younger Webber that he had only one note—the first one. The former says he did not claim that he was representing the defendant in error, while the latter says he did so claim. Both agree, however, that he was informed of the defenses to the note, whichever one it was; there is no other evidence in this record as to Stanton, except that above stated. The first note was returned again to the bank at Harrisburg, on August 3, 1888, and sent back again on August 6th. On August 9th it was returned to the Harrisburg bank, and by it handed to an attorney for collection.

After the maturity of the second note, this suit was brought on the first and second notes and the defense before alluded to was set up in special pleas with an averment of notice to defendants in error before purchase. On trial before a jury, a verdict was returned for the full amount of the notes, which was sustained by the court after overruling a motion for new trial. The record shows there was a conflict in the evidence as to whether or not there was a breach of warranty, but the evidence would seem to show that there was not a full compliance with the terms of the warranty, although under our view of the case we do not deem

it necessary to enter upon a review of the evidence on that point. The principal point made and relied upon by plaintiffs in error is, that the verdict was the result of erroneous instructions given on behalf of the defendant in error as to the law of notice to an assignee of notes. Only a part of the instructions given on behalf of the defendants in error, and none of those given on behalf of plaintiffs in error are printed in the abstract which, under the practice of the Supreme and Appellate Courts of this State would authorize us to refuse to consider the errors assigned in the instructions. The record, however, has been examined and the instructions considered as a series.

The instructions particularly objected to, are as follows: "In order to defeat a promissory note in the hands of a *bona fide* holder, it is not enough to show that he took it under circumstances calculated to excite suspicion. To defeat the note in his hands it must appear by a preponderance of evidence that he was guilty of a want of honesty or bad faith in acquiring it." "Where a person takes an assignment of a promissory note for a valuable consideration before due, and is not guilty of bad faith, even though he may be guilty of gross negligence, he will hold it by a title valid against the world, and it will not be subject to the defense of failure of consideration in his hands."

The sixth one of which instructions reads as follows: "The indorsement of a negotiable promissory note before maturity, taking it as payment or security for a pre-existing debt, and without any express agreement, is deemed a holder for valuable consideration, in the ordinary course of trade, and holds it free from latent defenses on the part of the maker."

The instructions given for the plaintiff in error on this point were as follows: "You are instructed that the term, bad faith, simply means the absence of good faith, and that a purchaser of commercial paper who takes the same with a full knowledge of defenses which would be availing as against the original payee, stands in no better situation with reference to such defense, than the person to whom such paper was originally made payable, and in this case if you

find from the weight of the evidence that the defendants would be entitled to succeed on the ground of a failure of consideration as against the Nordyke & Marmon Company, if they were plaintiffs, and that plaintiff took the notes or either of them with full notice of such defense, then this is sufficient proof of an absence of good faith."

"If you should find from the evidence that the consideration for which said notes were given has failed, and that after they were delivered to the Nordyke & Marmon Company, they were deposited with the plaintiff merely as collateral security, the plaintiff did, through its agent or attorney, receive notice of such failure of consideration, and that after receiving such notice the plaintiff discounted said notes and thereby became the owner of the same, then, and in that case, the plaintiff can not be allowed to claim that it is an innocent holder of said notes, and that it received them in good faith, without notice, and you should find for the defendant." These instructions as a series, on the question of notice to an assignee, properly state the law.

The Supreme Court in the case of Comstock et al. v. Hannah, 76 Ill. 530, say: "We accept the doctrine of cases as correct in principle which assert the law on this subject to be, 'when the bill has passed to the plaintiff without any proof of *bad faith* in him there is no objection to his title;' and "suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part.' And 'the duty of active inquiry does not rest on the purchaser of commercial paper to avert the imputation of bad faith.' The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a *speculative issue* as to his diligence or negligence.'" The counsel for plaintiffs in error cite cases of the Supreme Court decided at an earlier date than the Comstock case, apparently supporting their contention that notice of facts that would excite inquiry, are of themselves, in the eye of

the law, notice of the ultimate fact which such inquiry would have disclosed *as to an assignee* of a note before maturity; yet in the above case it is said, "there never has been more than an incidental assumption without discussion that such was the rule," and that "we find nothing in previous decisions which should conclude us from adopting what, upon investigation, we are satisfied is the correct doctrine in principle, and the prevailing rule of law." See also *Shreeves v. Allen*, 79 Ill. 553, and *Murray et al. v. Beckwith*, 81 Ill. 43, which last case holds that "the maker, who alone is responsible for the paper becoming an article of commerce, can not be permitted to defeat payment unless he can establish the fact that the holder purchased with notice. The sale and transferring of promissory notes enter largely into the commerce of the country, and public policy requires that an innocent purchaser should be protected." The doctrine of the *Comstock* case is approved in the case of *Siegel et al. v. Chicago Trust & Sav. Bank*, 131 Ill. 569, at p. 574. It is clear from these authorities, the general doctrine that notice of facts that should excite inquiry in the minds of a reasonably prudent person is notice of the ultimate fact which such inquiry would have disclosed, is not applicable to the assignment before maturity of such commercial paper as notes. They enter so largely as a convenient medium, like money, into exchanges or trade, stimulating business activity, and sustaining to as great extent the commercial prosperity of a country, that public policy requires they shall be given almost the freedom of money itself, in passing from hand to hand. Therefore, notice of the ultimate fact, and not merely notice of evidentiary facts, which should excite inquiry that, if pursued, would, by the exercise of diligence, lead to a knowledge of the ultimate fact, is essential to be established to impair the title of an assignee of a note before maturity. A speculative issue, which is necessarily involved, as to the diligence or negligence of such an assignee, following up, or failing to follow up, inferences suggested by such evidentiary facts, will not, as held in the *Comstock* case, be permitted. While such a rigid rule of law as applicable to the

transfer of negotiable paper may, in isolated instances, work hardships, yet in its general operation, the effect of the rule upon the business and property interest of the people, is largely beneficial in the increased value and use of such instruments to those who make or hold them. The counsel for plaintiff in error say that in the teeth of the authorities the court told the jury on behalf of defendant in error by the first of the above instructions "that plaintiffs in error, to sustain their defense, must actually convict the defendant in error of dishonesty and bad faith, and that circumstances, though strong enough to excite the suspicions of defendants in error, could not be considered by them. We say this instruction is not the law of this case." It will be observed that the plaintiffs in error, in their first instruction above quoted, told the jury that "a purchaser of commercial paper, who takes the same with a *full knowledge of defenses*, * * * stands in no better situation * * * than the person to whom such paper was originally made payable." Their other instructions given by the court, are substantially to the same effect. This statement of the law is in harmony with those given for the defendant in error, and with the decisions of the Supreme Court; for *knowledge* of defenses, before taking such a note, would be bad faith on the part of the assignee. There is a vast difference, however, between "knowledge of defenses," which is knowledge or notice of the ultimate fact, and knowledge of merely evidentiary or inferential facts, whereby, if the inferences are pursued, that is, if diligence is exercised, the ultimate fact will be discovered, or, negligently failing to pursue the inferences which should excite inquiry, it is not discovered. As is said in the Comstock case, "gross negligence may be evidence of *mala fides*, but it is not the same thing;" and the assignee's rights are not to be determined "by a speculative issue as to his diligence or negligence." The error of counsel seems to be in not observing this distinction in the law. Evidentiary facts may be shown for the purpose of proving the ultimate fact of notice of the defense, but such fact must be established, which, when done, constitutes bad faith. In the lan-

guage of the defendant in error's instruction of which complaint is made, "It is not enough to show that he took it under circumstances calculated to excite suspicion." The sixth instruction given for the defendant in error standing alone might be misleading. Its evident purpose was to state the law as to one taking a note before maturity to secure or pay a pre-existent debt. The conclusion of the instruction that such taker "holds it free from *latent* defenses on the part of the maker," when considered in connection with the issue that was made as to notice and the other instructions given for the plaintiffs in error would not mislead the jury, for a "latent defense" would be taken to mean an "unknown defense." The word latent means "not seen; hid; concealed; secret."

The question remaining as to notice is one of fact. Did the defendant in error have actual notice of a defense to the notes in suit? Counsel for plaintiffs in error concede there is no proof of notice as to the first note; was there notice as to the second note? There is no proof that the defendant in error ever sent the second note to any one for collection, unless it is under the claim that the attorney, Stanton, was its agent, and then had such note in his possession when he went to see the Webbers to settle the whole matter. As heretofore stated the elder Webber did not know which note he had in his possession. It might have been the third note for all he knew, as he testified. H. M. Webber was asked:

Q. Do you know which note he had with him? A. It was the first note, I think; that is my recollection.

He further says he did not look at the date, or read the note.

Q. You are sure that it was the first note? A. Certainly I am.

He further states that Stanton wanted to settle the whole matter. The cashier of the Harrisburg bank swears that he had this note at that time, and his books confirm his testimony. It is undisputed that the defendant in error did not discount the second note until August 1, 1888, nearly

three months after the time Stanton was to see the Webbers. There is no proof that Stanton was the attorney for the defendant in error in this or any other transaction, except from the inference to be drawn from his alleged possession of the first note. His declaration of agency is not of itself proof of the fact.

It is not conceivable under the evidence that the defendant in error sent Stanton there to settle the whole matter, when at that time it had no interest in fact, except in the first note, and there is not a scintilla of evidence to show that it had any authority from Nordyke & Marmon Company to settle anything. If he was the attorney of the defendant in error for that purpose, then it had notice of a defense to the notes in view of the statements of the Webbers, but the officers of the defendant in error bank, who had charge of the bank's paper, and must have known of such fact if it existed, all testify that they had no notice from any source of a defense to the notes, or either of them, before their purchase. Nordyke & Marmon Company officers testify they did not notify defendant in error, and Hall's letter returning the first note, as cashier of the Harrisburg bank, on the 13th of June, 1888, introduced in evidence, shows that he did not notify defendant in error of any defense. In view of all the facts and the inferences to be drawn therefrom the jury might find as a fact that Stanton did not have either the first or the second note in his possession, and that in no event was he the agent of the defendant in error. As at that time no one except Nordyke & Marmon Company had any power to clothe Stanton with the authority to settle the whole matter, it being assumed that the company retained the third note, as it is not accounted for in this record, the inference is that he was acting for that company. If this is correct then the only evidence of notice is that the defendant in error's agent, the Harrisburg bank, had notice of a defense to the first note and therefore notice of a defense to the second note.

It is true that notice to an agent as to a fact within the scope of his agency is notice to the principal, yet such notice

does not extend beyond the transaction covered by the agency; therefore, notice to the agent of a defense to the first note, was not of itself notice of a defense to the second note, unless the defendant in error knew the two notes related to the same transaction and were based upon the same consideration.

There is no proof that it did know this as a fact. The only evidence tending to show such knowledge on its part, is the fact of the identity of the notes as to dates, names, etc. If the evidence of Newby is true, then the defendant in error did not have possession of this second note until August 1, 1888—more than eight months after it had received the first note. Even if the evidence of Hallowell is correct, and Newby is in error, then the identity of the notes alone, under the circumstances they were received, would only be an evidentiary fact that there was a defense to the second note because there was to the first. Of itself it would not be such conclusive evidence of notice as to estop the defendants in error from claiming want of notice. In view of all the facts, the jury were justified in finding that the defendant in error did not have notice of a defense to either of the notes in suit before their purchase. It is therefore not necessary to consider other questions raised on this record.

The judgment is affirmed.

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CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1892.

Joseph Spear v. William H. Bull.

1. *Real Estate Broker—Who is Within the Meaning of—An Ordinance Requiring a License.*—B. resided at Rock Falls, and was engaged there in the real estate business. In the fall of 1890 he was occupied much of his time in Chicago, making his headquarters at the office of S. B., real estate brokers. He was interested with them in real estate deals in Indiana and elsewhere. He had no sign, desk or letter head showing that he was engaged in the real estate business in Chicago. It was held that the mere fact that he was interested with S. B. in deals concerning Chicago real estate and made frequent trips to Indiana at their instance, etc., would not make him a real estate broker of Chicago, within the meaning of the ordinance.

Memorandum.—Action of assumpsit. Appeal from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the December term, 1892, and affirmed. Opinion filed May 25, 1893.

The statement of facts is contained in the opinion of the court.

C. L. SHELDON, attorney for appellant.

JARVIS DINSMOOR, attorney for appellee.

OPINION OF THE COURT, HARKER, J.

This was an action of assumpsit by appellee to recover
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commissions as a real estate agent for services rendered in exchanging a farm in Whiteside County, belonging to appellant, for certain real estate in Chicago.

In addition to the general issue Spear filed a special plea setting up that at the time of Bull's employment and services as claimed, he was a real estate broker in the city of Chicago, doing business as such without a license, contrary to the ordinance of said city, and consequently not entitled to recover therefor.

Upon the trial there was a sharp contest upon two questions :

First. Whether Spear employed Bull to negotiate the trade.

Second. Whether at the time of the alleged employment and the rendering of the services Bull was a Chicago real estate broker within the meaning of the ordinances pleaded.

It is not controverted that Bull rendered active and valuable services in bringing about the trade, but Spear claimed that it was not by any employment on his part that they were rendered, but that he was employed by Tabor, the owner of the Chicago property, and that they were rendered as the agent of Tabor.

Upon the subject of employment there is a direct contradiction between the parties. The circumstances, however, corroborate Bull. We are not only satisfied from the evidence in the record that there was an employment, but that Spear so understood it at the time the negotiations were being carried on.

The evidence shows that both parties to this controversy reside at Rock Falls, Whiteside County; that Bull has resided there since 1880, and has been engaged there in the real estate business for a large portion of the time. In the fall of 1890, he was occupied much of his time in Chicago, making his headquarters at the office of Scott Bros., real estate brokers, at 97 Washington street. He seems to have been interested with them in deals for real estate in Indiana and elsewhere. It does not appear, however, that he had any sign, desk, card or letter head indicating that he was

engaged in that business in Chicago. Pending the negotiations for the Tabor property, his place of business was at Rock Falls. The mere fact that he was interested with the Scott Bros. in deals concerning Chicago real estate, that he made frequent trips to Indiana at their instance, and made their office his headquarters while they were putting trades through, would not make him a real estate broker of Chicago, within the meaning of the ordinance.

We do not think the damages awarded were excessive. According to the terms of the trade, the farm was taken at \$35,000. Computing the two per cent commission which the evidence shows is reasonable and customary, appellee would be entitled to \$700. As the farm was taken subject to a \$7,000 mortgage, which Spear had placed upon it, it is quite clear the jury did not allow commission on more than the difference between the \$35,000 and \$7,000.

We do not think appellant was prejudiced by the improper testimony heard by the jury and excluded by the court on motion of appellant's counsel. There are instances in which the hearing of improper evidence by the jury may work great harm to the litigant, notwithstanding the evidence be excluded by the court, but we can not see that this record furnishes one of them.

While some of the instructions are in a slight degree confusing and are open to criticism, for that reason we do not regard them so erroneous as to warrant us in reversing the judgment.

We feel that substantial justice has been done and that another trial would not result differently. Judgment affirmed.

Shepardson, Ex'r., v. McDole.

1. *Forcible Detainer.*—A suit in forcible detainer is governed by the same rules as other cases at law, except that the plea of not guilty is sufficient to admit evidence of any defense to the merits.

2. *Abatement—Former Suit Pending.*—The pending of another suit for the same cause is matter in abatement, to be taken advantage of by

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plea; and whether in a suit of forcible detainer a formal written plea was necessary or not, it is essential, in case the pending of another suit is to be made a defense, that it be pleaded in abatement, and unless the matter relied upon appears of record the requirement of the statute must be met by oath or affidavit.

3. *Notice to Quit.*—Where a person in possession of land claims to hold the same adversely, or where he claims by a title inconsistent with the relations of landlord and tenant, no notice to quit is necessary before bringing a suit to oust him from the possession.

4. *Abatement—What is—Former Suit Pending.*—The pending of a suit in chancery by a person in possession of land asking for a specific performance of an alleged verbal agreement between him and his deceased father, is not such a suit as can be pleaded in abatement, in an action of forcible detainer brought against him by the executor of the father's last will and testament.

5. *Abatement—Former Suit Pending—Reasons for the Rule.*—The reasons for abating a second suit, is that the defendant may not be vexed with a suit that is useless on account of the pendency of another suit in which the plaintiff may have the same remedy. But, in order to have the effect to abate the second suit, the remedy, furnished by the first action, must be complete for the same thing for which the second was brought.

Memorandum.—Forcible detainer. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the December term, 1892. Opinion filed May 25, 1893.

The statement of facts is contained in the opinion of the court.

HOPKINS, ALDRICH & THATCHER, attorneys for appellant.

LITTLE & MONTONY, attorneys for appellee.

OPINION OF THE COURT, CARTWRIGHT P. J.

Appellant, as executor of the last will and testament of Rodney McDole, deceased, brought this action in forcible detainer before a justice of the peace to recover possession of about 230 acres of land. The justice dismissed the suit for want of jurisdiction. On appeal to the Circuit Court the cause was submitted to the court for trial without a jury, and was tried upon an agreed state of facts which may be briefly stated as follows:

Rodney McDole was, in his lifetime and at his death,

May 13, 1891, the owner in fee of the premises in question, and by his last will and testament, duly admitted to probate, and in full force and effect, appellant was appointed executor and directed to rent the home farm, which included said premises, until sold, and to sell the same within five or six years after the testator's death, and distribute the proceeds. Appellant qualified as executor and made demand in writing February 24, 1892, upon appellee, for immediate possession of said premises, and commenced this suit March 19, 1892. Appellee was in possession of the premises when demand was so made, and has continued in such possession. Prior to the commencement of this suit appellee filed a bill in chancery in the Circuit Court of Kane County, against appellant as executor, and the persons interested in the estate of Rodney McDole, asking for a specific performance of an alleged verbal agreement between complainant and his father, the said Rodney McDole, and averring in said bill that complainant was to have possession of said premises and work the same on shares during the lifetime of his father, and at his death was to have the same upon payment to the estate of \$2,500 within two years after such death, in pursuance of which alleged agreement complainant claimed to have taken possession and made permanent improvement on the land. The defendants to that bill were brought into court and answered the same, denying the making of the agreement alleged and averring that possession of the premises was acquired and held as tenant of Rodney McDole, and that an agreement had been made by the heirs of Rodney McDole to which complainant was a party, providing for a division of the estate and an arbitration as to the value of improvements put on the premises by complainant. Appellant filed no cross-bill in the chancery suit, and did not ask for any affirmative relief, and said chancery suit was still pending and undetermined.

Appellant submitted to the court in various forms the proposition of law that this suit in forcible detainer could be maintained notwithstanding the pendency of the chancery suit commenced by appellee for specific performance,

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but the court refused to so hold, and thereupon found appellee not guilty, and rendered judgment against appellant for costs.

It is contended for appellant, that inasmuch as it was agreed that Rodney McDole, owner of the premises, and appellant became entitled to possession under the will, and demanded possession, and there was no evidence of any right to possession in appellee, the judgment was wrong. On the other hand, it is claimed that the court was right, because appellee had filed the bill claiming the right to possession, and the suit was pending, and also because appellant, in his answer to the bill in that case, had claimed that appellee was a tenant of Rodney McDole, and in this case had failed to show that sixty days notice to terminate such tenancy, had been given. Much of the arguments addressed to the court relate to family history, and dealings not in evidence, nor in any way affecting the decision of this case, which will not be noticed.

This case is governed by the same rule as other cases at law, except that the plea of not guilty is sufficient to admit evidence of any defense on the merits. The pendency of another suit for the same cause, is matter in abatement to be taken advantage of by plea to the action of the writ. 1 Chitty Pl. 454; Gould Pl., Chap. 5, Sec. 122. Whether in this case a formal written plea was necessary or not, it was essential in case the pendency of the chancery suit was to be made a defense to the writ, that it should be pleaded in abatement, and unless the matters relied upon appeared of record, that the requirements of the statute should be met by oath or affidavit. Greer v. Young, 120 Ill. 184; 3 Chitty Pl. 903, note Y; Rev. Stat., Chap. 1, Sec. L. There was nothing in the nature of a plea in abatement interposed in this case, and nothing putting that matter in issue.

If the pendency of the chancery suit was the basis of a judgment in this case, then if the issues were found for defendant the judgment would be that the writ be quashed. Cushman v. Savage, 20 Ill. 330. But the judgment of the court

was not on the writ, but in bar on the merits, and conclusive between the parties, that appellee was not guilty of unlawfully withholding the premises. But if the question should properly arise in this suit, the pendency of the chancery suit could not be made available by appellee in abatement of the writ. In order to have that effect the remedy furnished in the first action to the plaintiff in this action must be complete for the same thing for which this action was brought. The reason for abating the second suit is that the defendant may not be vexed with a suit that is useless on account of the pendency of another suit where the plaintiff may have the same remedy. If there was no remedy in the chancery suit for what was sought in this suit, which could be there furnished to appellant, or but a partial or ineffectual one, a plea in abatement could not prevail. It is manifest that the court in the chancery case had not acquired any right to act judicially and by its decree afford to appellant the remedy sought in this suit, or any adequate or effectual substitute for it. No injunction had been allowed and the complainant was merely seeking relief for himself, and had not brought the question involved in this suit before the court in such a way as to afford appellant any remedy whatever in that suit. If the complainant should not dismiss his bill, and it should proceed to final hearing and he should be defeated, all that the court could do would be to dismiss the bill, and it would not only be unable to give appellant the specific thing sought in this suit, but would leave him without relief for the rents and profits of the premises. This suit could not, therefore, be abated on account of that one.

If this were not so, any person in the possession of land might, by merely filing a bill in chancery, retain such possession when no injunction has been allowed, and prevent the rightful owner, entitled to the possession, from asserting his right, and thereby cause a loss of rents and profits. Such is not the rule. *Evans v. Lingle*, 55 Ill. 455; *Branigan v. Rose*, 3 Gil. 123.

The remaining claim, that the suit could not be main-

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tained without a previous notice to terminate a tenancy, served sixty days before the end of the year, is without merit. It is true that appellant in the chancery suit had alleged that there was a tenancy, but appellee in his bill had set up a title inconsistent with the relation of landlord and tenant. He claimed an equitable right to the premises and could not insist upon receiving the notice to which a tenant would be entitled while expressly repudiating any tenancy. *McGinnis v. Fernandes*, 126 Ill. 228; *Herrell v. Sizeland*, 81 Ill. 457.

The judgment of the Circuit Court will be reversed and the cause remanded.

City of Abingdon v. McCrew.

1. *Questions of Fact—Jury Should Govern.*—Where the evidence creates an impression of doubt in the minds of the court the verdict of the jury should govern.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

WILLIAMS, LAWRENCE & WILLIAMS, attorneys for appellant.

F. F. COOKE and A. M. BROWN, attorneys for appellee.

OPINION OF THE COURT, LACEY, J.

This was an action on the case by the appellee against the appellant to recover damages for injuries received by his stepping into a hole in the appellant's sidewalk, and breaking his leg, about nine feet east of the northwest corner of the Terry building in the city, as shown by the plat accompanying appellee's argument.

The case was in this court in May, 1892, on appeal of the appellant herein, and the judgment of the court below was reversed for error in instructions, and remanded for a new trial; it has been again tried and resulted in a verdict and judgment for appellee, for \$750, and this appeal is taken by appellant seeking to reverse such judgment. There seem to be no errors in the instructions or refusal of instructions, given or refused, by the trial court. The main cause assigned for error is that the evidence did not support the verdict. The appellant insists that the injury resulted on account of the negligence of the appellee, induced by intoxication, and maintains that the evidence shows that the defendant was not injured at the place that he claims to be, but at an entirely different place, some 140 feet east of the place claimed by the appellee, on the same sidewalk, and in front of the calaboose, where the sidewalk was in perfect repair. There can be no dispute but that there was a dangerous hole in the sidewalk, and that it had been there a sufficient length of time for the city to have been notified of it, and repaired it, by the use of reasonable diligence. The accident took place on the night of October 29, 1889. The appellee had been playing the violin for a dance at Chestnut Hall in the city of Abingdon, and left the hall for home about 11 o'clock at night, and claims that in going home he stepped into a hole in appellant's walk, at the point above named. It will not be necessary for us to go over and discuss the different points of the evidence. On the part of the appellee there was his own oath, and that of one Lewis in corroboration to some extent, and some other corroborating circumstances. On the part of the appellant there was the evidence of Greenwood, who testifies to facts and circumstances that, if taken alone, would be sufficient to establish the fact that the defendant was injured in front of the calaboose on Main street, instead of Terry's hall on the same street, and there was other evidence corroborating Greenwood's evidence, but after a careful reading we think it was a fair question for the jury to determine; and that the evidence for appellant was not so overwhelming that the jury would not be

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justified in rendering a verdict for appellee. The evidence makes the impression on our minds that it was a doubtful case whether the appellee was injured at the one place or the other. In that state of the evidence the verdict of the jury should govern.

As to the defendant's drunkenness, we have no doubt that he was considerably under the influence of intoxicating liquors, and probably not perfectly himself, but on the other hand, if he was injured at the place that he claims he was, the defect in the sidewalk was a dangerous one, and any one passing along in the night time, even while in the exercise of due care and caution, would be liable to injury.

All the facts considered, we think the jury would be justified in finding that the appellee, at the time of the accident, was in the exercise of reasonable care and caution.

Seeing no error in the record, the judgment of the court below is affirmed.

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1. *Venue—Change of—Affidavits.*—Plaintiff made a motion in the County Court for a change of venue, basing his motion upon a supposed prejudice of the inhabitants of the county, stating as his ground, certain derogatory articles published in the county newspaper of the adjoining county. In support of his petition he filed the affidavits of fourteen citizens of the county, all of whom stated, that, in their belief, plaintiff in error could not have a fair trial in the county, etc. The state's attorney filed six counter affidavits, the affiants in which were of the opinion that there was not any prejudice in the minds of the inhabitants, against the defendant, that would prevent him from receiving a fair trial. The County Court overruled the motion for a change of venue. *It was held* by the Appellate Court, upon examination of the affidavits, that the County Court was justified in overruling the motion.

2. *Pleading in Criminal Cases.*—Where a defendant is arraigned and "stands mute" it is the duty of the court to enter for him a plea of not guilty.

3. *Indorsing Witnesses upon the Back of the Indictments.*—In the prosecution of misdemeanors the law does not require the names of the witnesses to be placed upon the back of the indictment.

4. *Witnesses—Leading Questions.*—Where a witness is manifestly

unwilling to testify it is not error to allow the party calling him to ask leading questions.

Memorandum.—Indictment, violation of the dram shop act. Error to the County Court of Lee County; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

O'BRIEN & O'BRIEN, and DIXON & BETHEA, attorneys for plaintiff in error.

DEFENDANTS' BRIEF, CHARLES B. MORRISON, STATE'S ATTORNEY.

An application for a change of venue on account of the prejudice of the people, is addressed to the discretion of the court, and its ruling refusing the change will not be disturbed unless the discretion is abused. *Adams v. State* (Fla.), 10 So. Rep. 106; *Martin v. State* (Tex.), 17 S.W. Rep. 430; *Power v. People* (Col.), 28 Pac. Rep. 1121; *Perrin v. State*, 55 N.W. Rep. 516; *Hickam v. People*, 137 Ill. 75; *Barron v. People*, 73 Ill. 257; *Maton v. People*, 15 Ill. 536; *Myers v. People*, 26 Ill. 173; *Price v. People*, 131 Ill. 223; *Dunn v. People*, 109 Ill. 635.

No request was made by the plaintiff in error or his counsel for a list of the witnesses, so that he is not in condition to complain because witnesses were called and sworn, whose names were not on the back of the indictment; and had he requested a list of the witnesses it would be a matter entirely in the discretion of the court to permit other witnesses to be called. Unless the court can see that the discretion was abused it will not interfere. *Bulliner v. People*, 95 Ill. 394; *Gardner v. People*, 3 Scam. 83; *Logg v. People*, 92 Ill. 598; *Smith v. People*, 74 Ill. 144; *Perteet v. People*, 70 Ill. 171.

OPINION OF THE COURT, LACEY, J.

This was a case where the plaintiff in error had been

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indicted in the Circuit Court, on a charge eating liquors in violation of the "Dran without license. The indictment contains

On motion of the plaintiff in error changed from the Circuit Court to the plaintiff in error swearing that all the judges were prejudiced against him, so receive a fair trial. When the case reached the Court, plaintiff in error made another motion for a change of venue, this time basing his motion upon the prejudice of the inhabitants of the county of Ogle. The plaintiff in error's affidavit, bases his motion on certain derogatory articles against him published in a county newspaper of Ogle County, of which the Creston Observer, and in support of which he filed affidavits of some fourteen citizens, of whom he swore that they sustained the petition, and swore that in their belief the plaintiff in error could not have a fair trial in the county on account of the prejudice of the inhabitants of the county against him. The state's attorney filed affidavits, the makers of which were of the county, swearing that there was not any prejudice in the minds of the inhabitants of the county against the plaintiff in error, and that he should receive a fair trial.

We have examined the affidavits, and are of opinion that the county judge, after all were considered, was justified in overruling the plaintiff in error's motion for a change of venue from the county.

When arraigned plaintiff in error "stood mute," and the court entered for him a plea of not guilty. The case went to trial on such a plea before a jury. The jury found that the plaintiff in error was guilty of the crime charged, and on all the counts in the indictment upon which, after overruling plaintiff in error's motion for a new trial, the court sentenced him to pay a fine of \$100 on each count and costs of suit. The court found no error in allowing witnesses to testify by deposition, and not on the back of the indictment. This was

and the law does not require witnesses' names to be placed on the back of the indictment as conceded by counsel for plaintiff in error. There was no error in the ruling of the court in permitting certain evidence complained of to be admitted. The question to Sanderson, witness for the people, "What did you see Colby doing there?" was not improper. It was not assumed that he was doing anything wrong. The main objection made to the verdict is that the evidence failed to support it. We have read all the evidence over and think it fully sustained the verdict. While the plaintiff in error, as we gather from the evidence, was trying to secrete illegal sales of intoxicating liquors under the guise of selling "ginger ale," "cider" and soda water" and other harmless things, and while some of the people's witnesses prevaricated while on the witness stand and apparently tried to shield the plaintiff in error, there was sufficient evidence to fully justify the jury in finding the verdict of guilty on the entire number of counts contained in the indictment. It appears to us clear that the plaintiff in error was habitually selling intoxicating liquors without a license, and under such circumstances it would be strange, indeed, if he had not far exceeded in illegal sales the number of which he was charged and found guilty. The evidence fully sustains the verdict. The leading questions put to the people's witnesses by the court and counsel were not improper.

They were manifestly unwilling witnesses, which the court could plainly see, and it was justified in the course pursued.

The modification of the plaintiff in error's twelfth instruction was not error; the substance of it as modified was the same as it was when offered by the defendant.

Seeing no error in the record the judgment of the court below is affirmed.

that one of the appellants told appellees what kind of stone it would be, and also sent them to the city engineer, who said it was to be Berea sandstone, from Cleveland Stone Co. Before agreeing upon a price for cutting, appellees cut some of the stone furnished under the contract, on Boone's avenue, and that stone was of the designated kind. The price was fixed from the character of that stone, which was furnished in pursuance of the specifications, and they were properly admitted in connection with the other evidence on the question of the kind of stone to be furnished for cutting.

It is admitted that there was due to appellees \$336.69, under the contract; but it is claimed as to the excess above that sum that the verdict is not sustained by the evidence. It appears that part of the stone furnished was known as Malone stone, and that it was much harder to cut than the stone which was to be furnished. It was somewhat cheaper than that of the Cleveland Stone Co. There was evidence that appellees made complaint of the character of the stone, and that one of the appellants said that it was from Cleveland Stone Co.; that appellees continued to cut it, but that stone cutters who were working by the foot would not cut it, and if required to do so would leave. Finally stone was furnished that was called North Amherst stone, which was so rough and hard to cut that appellees quit the work. It was claimed that the Malone stone came from Berea, Ohio, and was such stone as appellees were to cut, but we think that the evidence showed that it was not such stone as appellants were bound to furnish. There was a conflict in the evidence as to whether appellees were to receive \$1.50 or \$2 for cutting corner stones, and the difference on that point amounted to \$57. Appellants contend that everything except that item was settled by the parties and that no other claim should have been considered. There was an attempt to adjust their differences, but when that question was reached there was a disagreement, and the attempted settlement came to an end. The other matters in controversy in the suit had not then been mentioned, but no

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settlement was effected and in our opinion nothing was done which would bar them. We think that the evidence justified the verdict, and the judgment will be affirmed.

The abstract furnished by appellants did not present the evidence in the record sufficiently for a fair understanding of the merits of the case, and appellees furnished an additional abstract, the cost of which will be taxed to appellants. Judgment affirmed.

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1. *Negligence—Danger Known and Obvious.*—Where dangers are known and obvious, if a person voluntarily incurs them, he can not recover for injuries suffered in consequence, for this would amount to compensating him for his own negligence.

2. *Pleading and Proofs—Allegations Not Sustained.*—An allegation in a declaration, that the superintendent of a mill wrongfully directed and commanded the plaintiff to belt a pulley on a shaft while a friction clutch pulley on the same shaft was in rapid motion, without shutting down the mill, and that the plaintiff was not guilty of any negligence in obeying the command, is not sustained where the proofs show that the plaintiff voluntarily undertook to belt the pulley himself, without any direction or suggestion of the superintendent tending to deprive him of the free exercise of his judgment, or cause him to encounter a risk which he was otherwise unwilling to assume.

3. *Master and Servant—Duty to Procure Safe Machinery.*—To require that machinery shall be free from doubt, in respect to safety in use, is equivalent to requiring that it shall be perfectly safe. It is a matter of common knowledge that machinery, generally, is not absolutely safe in use, and there is no requirement in law that an employer shall furnish such machinery.

4. *Practice—Offers of Proof—Exclusion of the Jury.*—Where offers of proof are to be made, the trial court may exclude the jury and require that such offers be made out of its hearing.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, McDougall & Chapman, Attorneys.

When the defects in the machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on the servant or coercing him into danger, or in some other way, directly contribute to the injury. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Assop v. Yates*, 2 H. & N. 768; *Gibson v. Erie Ry. Co.*, 63 N. Y. 453; *Laning v. N. Y. Central Ry. Co.*, 49 N. Y. 534; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Honner v. Ill. Central R. R. Co.*, 15 Ill. 550; *C. C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 552.

The duty to furnish safe machinery does not require that the machinery used shall be the best and latest improved of its kind, but only that it shall be reasonably safe and suitable for the purpose. 14 Am. & Eng. Ency. of Law, 892; *Shearman & Redfield on Negligence*, Sec. 87.

The rule seems well established, that an employe assumes all ordinary hazards arising from the performance of the duties of his voluntary engagement, and if he is injured by any of the ordinary perils of the service, the law will afford him no remedy. *C., B. & Q. R. R. Co. v. Clark*, 2 Brad. 596; *C., B. & Q. R. R. Co. v. Abend*, 7 Brad. 130; *W. St. L. & P. Ry. Co. v. Conkling*, 15 Brad. 157; *Clark v. C., B. & Q. R. R. Co.*, 92 Ill. 43; *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

APPELLEE'S BRIEF, Brewer & Strawn, Attorneys.

As to the sufficiency of the order given by the superintendent to place the belt on the pulley while the counter shaft and friction clutch were in motion, we call attention to the following cases: *Stephens v. Hannibal & St. J. R. R. Co.*, 96 Mo. 207; *Sioux City & P. R. R. Co. v. Smith*, 22 Neb. 775; *McDade v. Washington & G. R. R. Co.*, 3 Cent. Rep. 794; 5 Mackey, 144; *Neilon v. Marinette & M. Paper Co.*, 75 Wis. 579; *Nadau v. White River Lumber Co.*, 76 Wis. 120; *Lalor v. C., B. & Q. R. R. Co.*, 52 Ill. 401; *Lake S.*

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& M. S. R. R. Co. v. Lavalley, 36 Ohio St. 221
Wallace, 1 Macq. 748; Clark v. Holmes, 7 Hul
Grizzel v. Frost, 3 F. & F. 622; found in note
224.

OPINION BY THE COURT, CARTWRIGHT, J.

Appellant was the owner of a paper mill in Illinois, called The New Jerusalem. Thomas T. was superintendent of the mill, and appellee was work under his direction. Appellee's duties were to repair the machinery and make necessary repairs on new machinery and put it in working order. He previously worked in another paper mill at Macon for nine months, and also in a mill at Lafayette where he did the same kind of work, and had been engaged there about eight days when he met with the accident which was the subject-matter of this suit. At that time a new shaft was being put in. There were two large pulleys on the shaft, each twenty-four inches in diameter and four inch face, and also a friction-clutch pulley eight inches in diameter. One large pulley was keyed fast to the shaft at the east end, and received the power from the drive pulley. The other large pulley was on the shaft ten or twelve inches west of the drive pulley. To the loose pulley, on the west, was the counter shaft pulley, which was keyed to the shaft. When the drive pulley was connected with the power it turned the counter shaft and the friction-clutch pulley, but the loose pulley was still, except when the friction-clutch pulley was thrown into gear so as to clutch and turn it. The plan of the mill had been designed by Allen Gum, who preceded appellee on the same line of employment, and a shaft had been put in by him, but the pulleys had not then been received. Appellee commenced work on the counter shaft September 1. He found that the shaft that was in, was too short, and took it out and put in a longer one. He also moved the pulleys. He put on the pulleys and on September 6 the mill was ready for the belts.

The drive pulley was to receive a belt from the line shaft in the basement, which communicated the power, and the loose pulley was to be belted to a line shaft above to drive some fans. Appellee put the belts on both pulleys, but found that they were too loose, and took them off, and cut about two inches out of each belt. The belt from the line shaft in the basement was then put on the drive pulley and set it in motion, turning the shaft and friction-clutch pulley at the rate of about two hundred and thirty revolutions per minute. The loose pulley was standing still between the drive pulley and the friction-clutch pulley, which were rapidly revolving. Appellee then attempted to put the belt from the line shaft above on the loose pulley. While making that attempt he was in some way caught by the friction-clutch pulley and drawn down. His arm, shoulder blade and collar bone were broken, so as to require amputation of his arm, and he was otherwise injured. He brought this suit against appellant to recover damages for his injuries, and obtained a verdict for \$10,000, on which judgment was entered.

The charges contained in the declaration, upon which it was sought to fix a liability upon the defendant, were that the defendant had failed to have the elbow joints and knuckles of the friction-clutch pulley safely protected and guarded with flanges, shields and other guards, and to have the bolts and nuts properly trimmed off, guarded and protected, and that Tucker negligently and recklessly directed and commanded the plaintiff to belt the pulley while the counter shaft and friction-clutch pulley were making two hundred and thirty revolutions per minute, without shutting down the gates, and stopping the mill.

Plaintiff's statement of the circumstances attending the injury, was substantially as follows: After he had cut the belt connecting the line shaft with the loose pulley, and shortened it as before stated, he tried two or three times to throw it on the loose pulley with his hands, but it was too tight to be put on in that way. He then told Tucker that he could not put the belt on in that way, and that they

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had better shut down. Tucker said that he rope, and that he did not think it necessary t A rope was procured, and Tucker went on th and held up the slack of the belt, which was inch, six-ply belt, of gutta percha, while plaint to put it on by means of the rope. The meth putting on the belt with the rope, would be belt to the pulley with the rope, and then th tion-clutch pully into gear, and start the belted, and run the belt on in that way. Ther of about two and a half inches between the rin pulley which he was trying to belt, and the rin tion-clutch pully which was revolving, and w holding the belt and trying to pass the rope space, he was caught in some way by the f pulley. He had no thought of danger on a friction-clutch pulley being in motion, and his shut down the mill was not made on that acco

It is clear that so far as there was any dange either on account of the manner in which the s leys were put up, or on account of the absence other protection, or from not having the end nuts trimmed off, or because the friction-clute in rapid motion, such danger from any or all was open and visible, and as well known to p Tucker or the defendant. The plaintiff put and put the pulleys on it, and was familiar features. He had put on belts, and was acq the methods of putting them on with or wi When the rope was procured he immediately s put the belt on with its aid, from his own kno method to be used. The dangers being kno ous, if he voluntarily incurred them, he coul from the defendant for injuries suffered in which would amount to compensating him for ligence. *Camp Point Mfg. Co. v. Ballou*, 71 Louis & S. E. Ry. Co. v. Britz, 72 Ill. 236; C. Co. v. Munroe, 85 Ill. 25; Penn. Co. v. Lynch, Stafford v. C., B. & Q. R. R. Co., 114 Ill. 244.

If there is any right of recovery it must rest upon proof of the averments of the declaration that the superintendent, Tucker, wrongfully directed and commanded plaintiff to belt the pulley while the friction-clutch pulley was in rapid motion, without shutting down the mill, and the plaintiff was not guilty of negligence in obeying the command. Tucker denied that plaintiff said anything about shutting the mill down, or that it was thought of, so far as he knew. But, assuming that plaintiff's version of the occurrence is correct, as the jury might be justified in concluding, what was said by Tucker was not in the nature of an order or command; the question of danger was not even present in the mind of the plaintiff, and was not presented in any way to Tucker by the remark made by plaintiff, who spoke of shutting down as a mere matter of convenience. Tucker suggested the use of a rope on the same ground, and said that he did not think it necessary to shut down. Plaintiff adopted the suggestion without hesitation or objection. He did not consider the risk he was taking as not being within his employment, or make any objection on that account, and his duty to take it was not passed upon in any way, by Tucker. Plaintiff knew just as much about the risk as Tucker did, and it can not be said that Tucker thought of it or should have done so, while plaintiff, with equal means of knowledge, did not think of it, and would not be reasonably expected to do so. There was nothing in the suggestion to deprive plaintiff of the free exercise of his judgment, or to cause him to encounter a risk which he was otherwise unwilling to assume. We see nothing in what was said to take the case out of the rule.

The second and third instructions given at the instance of plaintiff, declared a liability of defendant if the machine was of doubtful safety, either in construction or intended use, and the superintendent induced the plaintiff to use it. To require that machinery shall be free from doubt in respect to safety in use is equivalent to requiring that it shall be perfectly safe. It is a matter of common knowledge, that machinery generally is not absolutely safe in use, and there is no requirement that an employer shall

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furnish such machinery. If defendant had been guilty of no wrong in respect to the machinery furnished, it could be guilty of no wrong in requiring plaintiff to use it. The instructions were also misleading, as the jury might understand that plaintiff was induced to do what he did by the mere suggestion of the superintendent. They might be readily applied to his remark, which plainly would not render the defendant liable.

It is objected that offers of proof were made of matters so clearly irrelevant to the issue that they could only have been made for the purpose of having the statements heard by the jury, with the object of prejudicing the defendant, and without any belief that the offered evidence would be competent. The court sustained objections to offers of proof, and finally required further offers to be made out of the hearing of the jury. While there was much persistence in offering proof so clearly irrelevant that it would be difficult to believe that it was regarded as competent, or made with a view to saving a doubtful question, there was no error of the court in its rulings, concerning the offers, and we think that the jury were made to understand that they were not to be considered.

Other objections are made; but, in the view that we take of the case, it will not be necessary to consider them. In our judgment the evidence does not sustain the verdict. The judgment will be reversed, and the cause remanded.

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1. *Statutes—Right to Appoint a Poormaster.*—The city of Moline, having been organized into a town, having over 3,000 inhabitants, under Sec. 1 of the act of May 23, 1877, entitled, "An act to authorize county boards in counties under township organization to organize certain territory situated therein as a town," has the legal right to appoint the poor-master of such town, and it would seem within the spirit of the statute, that he should give a bond to the town, conditional for the faithful discharge of his duties, although there is no express provision of the statute requiring him to do so, and that the city clerk should approve it.

2. *Statutes—Application of the Pauper Act.*—Section 18 of chapter 107. R. S., entitled “Paupers,” providing that in towns containing 4,000 inhabitants, or over, the county board may, upon the written request of the supervisors, appoint an overseer of the poor, etc., applies only to ordinary towns having 4,000 inhabitants or over, and not to towns organized out of the territory of a city under Sec. 1 of the act of May 23, 1877.

3. *Statutes—Different Provisions to be Construed Together.*—Where the provisions of different statutes pertain to the same subject and have but one aim and object in view, they must be construed together into one entire system, as if enacted into a single act, and, so far as it can reasonably be done, each provision given force and effect.

4. *Supervisors—Power to Approve the Bond of Poormaster.*—Where a poormaster is appointed by a city council for a town, organized out of a part of the territory of the city, under the act of May 23, 1877, the duty of approving his official bond does not devolve upon the board of supervisors of the county.

Memorandum.—Mandamus proceedings. Error to the Circuit Court of Rock Island County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

PLAINTIFFS’ BRIEF, J. T. KENWORTHY AND M. M. STURGEON,
ATTORNEYS.

It was error for the court to award the peremptory writ in this case, requiring the respondents to approve the particular bond described therein. The utmost the court had the right to do was to require the respondents to approve some bond—that is, to set them in motion in the premises. Kelley v. City of Chicago, 62 Ill. 279; People v. Dental Examiners, 110 Ill. 180; People v. Mayor, 25 Wend. 680; People v. Council of Troy, 78 N. Y. 33; Moses on Mandamus, 54, 104; People v. Knickerbocker, 114 Ill. 546; People v. Hyde Park, 117 Ill. 464; State Board v. People, 123 Ill. 238; People v. Commissioners, 118 Ill. 242; People v. Trustees of Schools, 42 Ill. App. 60.

DEFENDANT’S BRIEF, BROWNING & ENTRIKIN AND J. B. OAK-
LEAF, ATTORNEYS.

The contention of the plaintiffs is that the two sections of

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the statute in reference to the appointment of the poormaster are in direct conflict, and the section giving the city council the right to appoint is repealed by implication by the said statute giving the board of supervisors the right to appoint; while our contention is that there is no conflict between the two statutes, but both should stand.

These two statutes are not the creation of new and independent systems of township organization, but an adaptation of the general system previously in force, with modifications deemed essential to the different relations and circumstances, to territory under city organization and country towns, and these acts are therefore *in pari materia*, and both must be read and construed together as constituting one entire system, and as if enacted in a single act. The People ex rel. v. Hazelwood, 116 Ill. 319; Young et al. v. Stearns et al., 91 Ill. 221.

“In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning.” 12th American Rule, Potter’s Dwarries Statutes, 144.

“All statutes *in pari materia* are to be read and construed together, as if they formed parts of the same statute and were enacted at the same time.” 17th American Rule, Potter’s Dwarries Statutes, 145.

OPINION OF THE COURT, LACEY, J.

This case involves the question of the right to appoint a poormaster for the town of Moline, county of Rock Island, State of Illinois. The relator, Ezra L. Eastman, was appointed poormaster by the town of Moline, by its city council, and he sought to compel by mandamus, the board of supervisors of the county of Rock Island, to approve his official bond, which it had refused to do. On the 11th of July, 1892, the relator’s official bond was presented to the board for approval, and on the 12th of the same month, the

said board of supervisors appointed one L. F. Kerns as poormaster of the town of Moline and approved his bond in the sum of \$1,000, who thereupon assumed the duties of the office of poormaster of said town. On the same day the relator filed his petition in the Circuit Court of the County of Rock Island, praying for a writ of mandamus to approve his said bond. A demurrer was sustained to his petition because the bond was not drawn with proper conditions. On the 14th of September, the appellants, being in session, a motion was made before them by the relator to fix the amount of his bond as poormaster of Moline, which motion was ruled out of order; thereupon he tendered his new bond as poormaster in the penal sum of \$1,000, with Charles F. Hemminway and M. J. McEniry as sureties, dated April 20, 1892, which is the bond in controversy in this case, and asked the board to approve it, but the chairman ruled the matter out of order, because there was a poormaster in Moline, appointed by the county board at the July meeting, who had given bond which was approved by the said board. The relator then offered to furnish bond in any sum which the board saw fit to demand, which was refused. On November 14, 1892, the relator filed his second petition for a writ of mandamus to compel the said board to approve the said last mentioned bond, which is the petition in this case. February 9, 1893, judgment of the court was entered, that peremptory writ of mandamus issue, commanding respondents to approve the last mentioned bond. The question involved in this case is, which, under the law, has the right to appoint the poormaster of the town of Moline, the city council of the city of Moline, or the board of supervisors of Rock Island county? A solution of this question depends upon the proper construction to be given to several sections of the statute of the township organization act, and the pauper act. The city of Moline was organized under section one of act, May 23, 1877, into a town, having over 3,000 inhabitants. It was enacted by the legislature May 23, 1877, in force July 1, 1877, as follows, to wit:

“Sec. 1. That the county board in any county under

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township organization may provide that the territory embraced within any city in such county shall be organized as a town, provided such territory shall have a population of not less than 3,000 inhabitants, and provided that city councils in such city by resolution request such action by the county board.

“Sec. 2. The territory of any city, now organized within the limit of any county, now under township organization, and not situated in any town, shall be deemed to be a town.

“Sec. 3. All town officers within any town organized as aforesaid, shall be elected at the annual charter election of said city. All general elections held in such city and town shall be held at the same voting places as the city elections, with judges and clerks appointed in like manner as for city elections.” (This section declared by Supreme Court unconstitutional, 116 Ill. 319.)

“Sec. 4. The power vested in said town shall be vested in the city council.

“Sec. 5. The city council in such city and town may, by ordinance, provide that the officers of city and town clerk may be united in the same person; that the officers of treasurer and town collector shall be united in the same person; that the election of highway commissioner shall be discontinued, and that the offices of supervisor and poormaster shall be separated, and the poormaster appointed by city council.” Hurd’s Statute 1891, page 1416, chapter 139; sections 136, 137, 138, 139, 140. Section No. 5 was added as an amendment to the original sections, June 18, 1883. In force July 1, 1883.

Sec. 18, Chap. 107, entitled “Paupers,” Hurd’s Statute, 1891, page 1019, provides as follows: “In counties under township organization the supervisors of the respective towns therein shall be ex-officio overseers of the poor of their towns, provided that for towns containing 4,000 inhabitants or over, upon written request of said supervisors the county board may appoint an overseer who is a resident of such town, fix his compensation and term of office, which shall not exceed the term of the said board. The overseer

so appointed shall execute to the county an official bond in a penal sum, and with securities to be fixed and approved by the county board, conditioned for the faithful discharge of his duties, and a due application of such funds and property as shall come to his hands as such overseer."

Section 14 of the same pauper act requires the counties to support the paupers except in cases where the poor are supported by the towns, and section 15 requires the town to support the poor and indigent persons where the poor are supported by the towns as provided by law. By section 101, chapter 139, township organization act, Hurd's Statute, 1891, it is provided that "A supervisor, before he enters upon the duties of his office, is required to give an official bond to the town, conditioned for the faithful discharge of his office as supervisor, which bond is required to be approved by the town clerk and filed in his office, with such approval indorsed thereon."

The city of Moline, in March, 1879, by resolution requested the board of supervisors of Rock Island county to organize the territory embraced in said city into a town, the said city at that time and ever since having a population of over 3,000. At a special term in March, 1879, the board of supervisors organized the said territory into a town under the name of the town of Moline. On the 10th day of March, 1880, said city council, by ordinance, provided that offices of supervisor and poormaster be and were thereby separated and the poormaster appointed by the city council. The said ordinance has ever since been in force, and the city council has ever since appointed such poormaster. The said relator took and subscribed the oath as poormaster, and the city clerk gave him a certificate under his hand and seal as such poormaster, which was duly presented to the board of supervisors. There are two questions arising in this case under these various statutes. First: Has the board of supervisors the legal right to appoint the poormaster under the sections of the pauper act above quoted, or does that duty devolve upon the city of Moline? Second: Conceding that the city of Moline has the legal

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right to appoint the poormaster, has the board of supervisors any duty to perform by way of fixing or approving the official bond of such poormaster.

Under section 18 of the pauper act, giving the supervisors the right to appoint the poormaster in towns containing 4,000 inhabitants or over, it would seem to be broad enough to include the town of Moline, provided it had 4,000 inhabitants or over, and provided there was no exception to this provision of the statute inferable from the various sections above quoted. All the sections of the statute pertain to the same subject and have one aim and object in view, and must be construed together, and each of the parts and provisions given force and effect so far as it can reasonably be done. In other words, these sections must be construed *in pari materia*, and the whole read together, and construed as constituting one whole entire system and as if enacted in a single act. This principle has been fully decided by the Supreme Court, in *The People ex rel. v. Hazelwood*, 116 Ill. 319, and the cases there cited. We are of opinion that in case of a city as that of Moline, situated with reference to the town as it is under the sections of the statute above quoted, it, having 3,000 inhabitants or over, has the legal right to appoint its poormaster, fix and approve his official bond, notwithstanding it may have over 4,000 inhabitants, and that section 18 of the pauper act only applies to ordinary towns having 4,000 inhabitants or over, not situate as the town and city of Moline are. There might be a construction placed upon the different sections quoted which would give the board of supervisors the right to appoint the poormaster for the city and town of Moline, after it reached in population the number of 4,000, leaving to the city of Moline the right to appoint the poormaster while it had the population between 3,000 and 4,000, but we think this would be an unnatural and strained construction and not warranted by the reason of the case.

The remaining question in the case is whether the board of supervisors had any power or duty to fix or approve the relator's official bond. We are inclined to think it had not.

If it had any such right it must have acquired it under section 18 of the pauper act above quoted, which allows it to appoint a poormaster in a certain grade of townships and fix the bond and approve the security, the bond in that instance being required to be executed to the county.

But that requirement and provision apparently extends to no other case. Holding as we do that that section does not apply to the city and town of Moline, which are the same, we can not see wherein there is any provision of the statute that requires the poormaster appointed by the city council of Moline to execute a bond payable to the county, or the board of supervisors to approve it. In all ordinary cases the supervisors are ex-officio poormasters and the supervisor is only required to execute an official bond to the town which is approved by the town clerk, no bond being required to be given as overseer of the poor or poormaster. In such case we suppose his bond would cover any defalcation in the performance of his duties as overseer of the poor. But in the case of the city and town of Moline, the offices of supervisor and poormaster being separated, it would seem within the spirit of the statute that the poormaster should give a bond to the town of Moline conditioned for the faithful discharge of his duties, although there is no express provision of the statute requiring him to do so; though we will not decide more than that the board of supervisors are not the proper parties to approve it. In such case, then, the city clerk, who takes the place of the town clerk, should approve the bond. Therefore we hold that the board of supervisors had nothing to do with the case, either to appoint the poormaster or to approve the security of his official bond. There are a number of other questions raised by plaintiff in error but in the view we take of the case it is not necessary to notice them.

The court below, however, ordered a peremptory writ of mandamus compelling the board of supervisors to approve the security on the official bond of the relator tendered to it by him. We think the court erred in so doing. The judgment of the Circuit Court is therefore reversed and the cause remanded.

Miller v. Davis & McKinney.

1. *Instructions—Liability of Parent for the Debt of a Child.*—An instruction which states that if the jury believe from the evidence that the plaintiff sold the minor child of the defendant articles of clothing, and that the same were necessities suitable to the condition of said child, and that the defendant authorized the plaintiff to sell and furnish her minor child with goods on her credit, by either direct instructions or by circumstances which would lead a reasonable man to infer that the defendant would pay for the goods, then the verdict must be for plaintiff, is erroneous. Parents often pay debts improvidently made by children when there is no legal obligation to do so. It is sometimes done from a spirit of pride and sometimes to prevent unpleasant consequences; under such circumstances a reasonable man might infer that a parent would pay.

2. *Parent and Child—Parent's Liability.*—Where a child resides away from home without the consent of its parent, in order to hold the parent for goods furnished, an express promise must be proven or the facts and circumstances must be such that a promise can be inferred.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, J. A. MCKENZIE AND PRINCE &
WELSH, ATTORNEYS.

There must be, in order to bind the parent, an express promise proven, or the facts and circumstances must be such that a promise can be inferred. *Hunt v. Thompson*, 3 Scam. 179; *McMillen v. Lee*, 78 Ill. 443; *Schnuckle v. Bierman*, 89 Ill. 454; *Gotts v. Clark*, 78 Ill. 229; *Murphy v. Ottenheimer*, 84 Ill. 39; *Allen v. Jacobi*, 14 Brad. 277.

J. L. WELLES, attorney for appellees.

OPINION OF THE COURT, HARKER, P. J.

This suit was commenced before a justice of the peace by appellees to recover for goods furnished appellant's minor

daughter while the latter, without consent of appellant, was residing away from home. There was a trial and judgment before the justice, and an appeal taken to the Circuit Court. A trial there resulted in a verdict and judgment in favor of appellees for \$11. An appeal was prosecuted to this court and the judgment reversed because of an erroneous instruction. *Miller v. Davis & McKinney*, 45 Ill. App. 447.

For a statement of the facts we refer to the opinion there reported.

The case was tried after being remanded by us, and a verdict and judgment rendered in favor of appellees for \$21.80. It is plain from the evidence that the goods were obtained without the consent or knowledge of appellant. A recovery was sought at the last trial because appellant, a few years before the goods were furnished the daughter, told one of the appellees that whatever her children should get at their store she would pay for, being satisfied, as she said, that they would get nothing not needed by them. Appellant denied making such statement.

Much as we dislike to disturb the judgment, because of the insignificant sum recovered and the unimportance of the question involved, we are compelled to do so, because of the following erroneous instructions given for the plaintiffs:

1. The court instructs the jury that if they believe from the preponderance of the evidence that the plaintiffs sold the minor child of the defendant certain articles of clothing and that the same were necessities suitable to the condition of said minor child, and if they further believe from the evidence that the defendant authorized plaintiff to sell and furnish her minor children with goods on her credit by either direct instructions or by circumstances which would lead a reasonable man to infer that the defendant would pay for said goods, then your verdict must be for plaintiffs for the amount proven to be due.

Where the child resides from home without the consent of the parent, in order to hold the parent for goods furnished, an express promise must be proven or the facts and circumstances must be such that a promise can be inferred. There

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is a difference between circumstances from which a promise may be inferred and circumstances that would lead a reasonable man to believe the goods would be paid for. Parents often pay debts improvidently made by children when there is no legal obligation to do so. It is sometimes done from a spirit of pride and sometimes to prevent unpleasant consequences following the child. Under such circumstances a reasonable man would be led to infer that the parent would pay.

We see no other substantial error.

Reversed and remanded.

Balcom v. Michels.

1. *Character—An Action for Slander.*—Where a plaintiff's character is attacked by evidence under a plea of justification, showing that the plaintiff has committed a crime, and casting upon him an imputation of dishonesty, it is competent for him to show, if he can, that he has sustained a good character for honesty in the community where he has lived.

2. *Instructions—Character in Actions of Slander.*—In an action for slander it is error to refuse to instruct the jury that evidence of the plaintiff's general reputation as a law abiding citizen is only intended in mitigation of damages, and not as an impeachment of his character for honesty and integrity.

Memorandum.—Action for slander. Appeal from the Circuit Court of De Kalb County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

JONES & ROGERS, attorneys for appellant.

CARNES & DUNTON, attorneys for appellee.

OPINION OF THE COURT, HARKER, J. P.

This is an action on the case for slander, brought by ap-

pellant against appellee for publishing that appellant had stolen appellee's chickens. To the declaration the general issue and a plea of justification were filed. Under the first plea it was shown in mitigation of damages, by a large number of witnesses, that the plaintiff's general reputation as a law-abiding citizen was bad. The defendant also introduced proof in support of his plea of justification. The plaintiff introduced witnesses in rebuttal and attempted to show that his general reputation for honesty and integrity in the community where he lived was good, but the court sustained objections to such testimony, and would not allow the plaintiff to make the proof. In this the court erred. The plaintiff was entitled to have this testimony heard for the purpose of meeting the proof made by the defendant that his general reputation as a law-abiding citizen was bad in mitigation of damages, and also to meet the proof offered by the defendant in support of his plea of justification. *Stowell v. Beagle*, 79 Ill. 529; *Harbison v. Shook*, 41 Ill. 141.

The error is not trivial or merely technical as contended by appellee. Wherever a plaintiff's character is attacked by introducing evidence under a plea of justification, showing that plaintiff has committed a crime and casting upon him an imputation of dishonesty, it is highly important for him to show, if he can, that he has sustained a good character for honesty in the community where he has lived. The court refused the following instruction: "You are further instructed that evidence of plaintiff's general reputation as to his being a law-abiding citizen is only intended in mitigation of damages, and is not impeachment of plaintiff's character for honesty and integrity, and that plaintiff's character for honesty and integrity is presumed to be good." This instruction violated no rule of law, and was applicable to the evidence.

We refrain from expressing any opinion as to the merits of the controversy, as the case must be submitted to another jury. For the errors indicated, the judgment will be reversed, and the cause remanded.

City of Joliet v. McCraney.

City of Joliet v. Kate McCraney.

1. *Notice—Defects in Sidewalks.*—The superintendent of streets in a city was informed that a sidewalk was in an unsafe condition by one of his assistants a short time before the occurrence of an accident resulting in an injury, and in ample time to have repaired it. *It was held*, that the notice to the city was sufficient.

2. *Instructions—Notice of Defects in Sidewalks.*—An instruction which states that, if a city had no actual notice of defects in a sidewalk, and that it was in such a condition as to appear safe and free from defects to those having occasion to pass over it, the city would not be liable, is erroneous and properly refused. It is the duty of a city to use reasonable care in discovering defects in its sidewalks, and to repair them.

3. *Notice—Of Defects in Sidewalks—When Inferred.*—A city, having actual notice of the building of a sidewalk, will be held to know how long it has been built, and of its tendency to decay. Reasonable prudence requires that a wooden sidewalk, which has been built eight or nine years, should be examined occasionally, to see if it is in a safe condition, and if it appears that such an examination would have disclosed defects, a jury may reasonably infer notice, even when no actual notice is shown.

4. *Damages—When Excessive.*—The question of damages is one peculiarly within the province of the jury, after hearing the evidence, and unless it appears that they have been governed by passion or prejudice, the Appellate Court will not interfere with the verdict.

Memorandum.—Trespass on the case for injuries resulting from a defective sidewalk. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBBEL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, JOHN W. D'ARCY, ATTORNEY.

It is well settled law in this State that before a municipal corporation can be held liable for damages resulting from a defective sidewalk, there must be actual notice to the corporation of the defect, or it must have existed a sufficient length of time to have enabled the corporation, by the exercise of reasonable diligence, to make discovery and

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remedy the defect. Dillon on Municipal Corporations, Sec. 790; Chicago v. Murphy, 84 Ill. 224; Chicago v. Stearns, 105 Ill. 554; Dewey v. Detroit, 15 Mich. 307; Joliet v. Walker, 7 Brad. 267; Chicago v. McCarthy, 75 Ill. 602; Chicago v. Herz, 87 Ill. 541.

APPELLEE'S BRIEF, J. L. O'DONNELL, AND MEARS & SPRAGUE,
ATTORNEYS.

Express notice was given to the superintendent of streets by the assistant superintendent of streets, who, in our opinion, might well charge the city by his own knowledge of the defect. The proof of this express notice is uncontradicted. The fact that the material of which the sidewalk was composed, had in the course of time become destroyed by natural decay, would alone constitute implied notice to the city. City of Aurora v. Hillman, 90 Ill. 61.

OPINION OF THE COURT, LACEY, J.

On the 13th of July, 1890, between six and seven o'clock, the appellee, Mr. Edward Comiskey and a daughter of appellee were walking along on the sidewalk, between Washington and LaFayette streets, on the east side of Des Plaines street, Joliet, abreast, the two ladies on the inside and Mr. Comiskey on the outside, and a little girl was walking about a half step behind them. Comiskey stepped on a plank of the sidewalk and the other end of it tipped up and the appellee being on that end got her foot in the hole and he lost his balance, let go of the plank, and it came down on appellee's leg, and she fell over against the fence; the nails of the plank were rusted away; the sidewalk was in bad condition; it was not easy to see it by one walking along, but the stringers were rotten, and the boards in the sidewalk loose. This suit was brought in an action of trespass on the case, by appellee, to recover damages for the injuries received. The declaration charges the defendant with wrongfully and negligently suffering its sidewalks, under its charge and control, to be and remain in bad and unsafe condition, and divers planks wherewith the said

City of Joliet v. McCraney.

walk was laid being insecure and unfastened, by means thereof, the plaintiff, who was then and there passing along upon the sidewalk, and while in the exercise of due care and caution, accidentally tripped and stumbled upon and against one of the unfastened and insecure planks of the walk, etc., and was injured, setting the damages at \$5,000. Upon a trial the jury found in favor of the plaintiff, and assessed her damages at \$2,500. Motion was made by appellant for a new trial, which was overruled by the court, and judgment rendered against the city for the amount of the verdict and costs. From this judgment this appeal is prosecuted. The grounds urged for reversal, are, that the city had no notice of the unsafe condition of the sidewalk; that it had used all reasonable care and caution to keep the same in repair; that the court erred in refusing to give the appellant's eighteenth refused instruction; and that the damages were excessive. The evidence tended very strongly to show that the sidewalk was an old one, made out of pine boards laid transversely across four 4x4 stringers, laid on the ground; that it was eight or nine years old, and that the planks and stringers had become decayed and rotten, so that they would not hold a nail, and that it was in an unsafe condition; and the evidence also tended to show that the superintendent of streets of the city was informed of its condition, by the assistant superintendent, a short time before the accident, but in ample time for the city to have repaired it, and nothing was done in that particular.

The jury were clearly justified from the evidence in finding that the sidewalk was in an unsafe condition and that the city had ample notice of it in time to have repaired it. As to the refused instruction eighteen, we think the court properly refused it. It would have been error to have given it; for it laid down an improper rule of law whereby the city would be excused from discovering its defects and repairing the walk. In substance it instructed the jury that if the city had no actual notice of the defects in the sidewalk, and that it was in such condition that it appeared to be safe and free from defect to those who had occasion frequently to pass over it, then the city would be excused and the jury

would find for the defendant. This does not announce the proper rule. It was the duty of the city to use reasonable care and caution in discovering defects in the sidewalks and to repair them. Such a duty does not devolve on a mere passer by. When the city had actual notice of the building of the sidewalk, it must be held to know how long it had been built, and reasonable prudence would seem to require that when a wooden sidewalk had been built eight or nine years that it would examine it occasionally to see if it were safe. If such an examination had been made, the defect would have been discovered, and the jury might reasonably infer from the evidence, notice to the city, on account of the sidewalk having been in a defective condition such a length of time as that the city should be held to notice, even though no actual knowledge of its condition be shown. The twelfth instruction given on behalf of the appellant laid down the proper rule as regards the notice on the part of the city, actual or constructive, and was all that the appellant had a right to ask. The remaining question is the one as to excess of damages. That was a question peculiarly for the jury after hearing the evidence, and unless it appeared to have been governed by passion or prejudice, this court has no right to interfere. The evidence tended to show that before the accident appellee was a well and hearty woman and the mother of eight children, kept a boarding house, and thereby supported herself and family without assistance. At the trial, she had suffered since the accident great pain and was disabled from work, being a period of about three years. The evidence also showed an injury to the shin bone caused by the fall and that it had developed into a necrosis. The bone decayed and pieces came out of the wound, abscesses formed on the back of the leg inside of the knee cap and discharged offensive matter; the appellee was prematurely disabled with no prospects of recovery. We can not therefore say that the jury was not justified in rendering the verdict that it did. The record is peculiarly clear from error, in fact, we see no legitimate defense the appellant can make to the action, or any error that the court below committed. The judgment is therefore affirmed.

Monmouth Mining and Manufacturing Company v. Regmier.

1. *Surveys and Plats—Mines.*—The object of Sec. 2, Chap. 94, R. S., entitled mines, is to obtain evidence as to whether mining operations are being carried on under or on the premises of an adjacent owner. When this object is attained the duties of the surveyor or appointee of the court ceases. The surveyor may be a witness and make a plat explanatory of his survey, and the owner may introduce in connection the oath of a witness showing its accuracy the same as other plats are introduced in evidence.

2. *Plats and Reports of Survey—Admissibility in Evidence.*—When a person is appointed under Sec. 2 of Chap. 94, entitled “An Act to Revise the Law in Relation to Mines” by the court, to make examinations and surveys for the purpose of ascertaining whether the mine is being worked upon the land of an adjacent owner, the plat, without proof of its correctness, much less a report of the surveyor of what he may choose to state in it, is not admissible in evidence.

3. *Statutes—Construction of Mines, Surveys and Plats.*—The statute authorizing a survey of lands adjacent to mines upon a complaint being made, simply gives legal authority to go upon the premises and make the survey, which otherwise would be a trespass. The proceedings are in the nature of a search warrant. It requires no record, plat or report to be made of such survey, and if the same are made they are not admissible in evidence without proof of their accuracy.

4. *Damages—Trespass—Mining under the Premises of Another, etc.*—In an action for damages resulting from the defendant's mining under the plaintiff's premises the damage must be confined to the direct results of the wrongful acts and must not include elements of other causes.

Memorandum.—Action for trespass. Appeal from the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

KIRKPATRICK & ALEXANDER, attorneys for appellant.

MATTHEWS & PEACOCK and GRIER & STEWART, attorneys for appellee.

OPINION OF THE COURT, LACEY, J.

The appellee recovered judgment in the court below

against the appellant in an action of trespass in the sum of \$778.10 for mining under the surface of appellee's land, clay earth and sand rock and other substances used by it in the manufacture of sewer and drain pipe and tile and other articles of manufacture, which mining was carried on from appellant's mining premises adjoining those of appellee and was done from an underground shaft on the former's land by means of a drift or shaft which carried the miners into and upon the land of the appellee, where mining operations were carried on to a large extent and large quantities of clay and sand rock removed from the latter's premises which was claimed to be of great value. It is also charged in the second count of the declaration that the appellee's well was caused to dry up by reason of the mining operations carried on under his premises and under the well so that the same became worthless, etc. The excavation underneath the appellee's premises was about ninety feet from the surface; there was a vein of coal about twenty-two to twenty-six inches thick about fifty feet down from the surface and the well in question was about thirty-five feet deep. The well, claimed to have been injured, was at the dwelling house of appellee. There were two disputed questions tried before the jury: 1, whether appellant had mined the appellee's land as charged in the declaration and to what extent; 2, was the mine under appellant's well and did it drain the water from it and dry it up as claimed.

Prior to the commencement of the suit the appellee had made petition to the judge of the Circuit Court for the purpose of having a survey and examination made of the mine by some competent person to be appointed by the judge to ascertain if the mine was being worked on the premises of the petitioner. The judge in accordance with the statute, Sec. 2, Ch. 94 R. S., appointed one T. S. McClanahan to make the survey. The latter made it accordingly and made a plat of his survey and report to the judge in writing, accompanying the plat, of his acts and drawings in the premises, giving in his report a detailed account of the extent of the mining operations under appellee's land, which plat was

Monmouth Mining & Mfg. Co. v. Regmier.

filed in the circuit clerk's office and approved by the court. This report the appellee offered in evidence, to which the appellant objected. The court overruled the objection and admitted it, to which proper exception was taken. In this we think the court erred. The object of the statute is to obtain evidence as to whether mining operations are being carried on under or on the petitioner's premises. When this object is attained the duties of the surveyor or appointee of the court ceases. The surveyor may be a witness in the case and make a plat explanatory of his survey and appellee may introduce it in evidence in connection with the oath of a witness testifying to its accuracy the same as other plats are introduced in evidence. The plat itself, without proof, much less a report by the surveyor of what he may choose to state in it, is not admissible. It will be observed by reading the statute that the petitioner may make his petition under oath to the circuit judge, not the court, for the appointment of the surveyor, no notice being required of such intended application to any one; thereupon the judge appoints the surveyor, who makes the survey under sanction and protection of the law. The statute simply gives legal authority to make the survey and to go into the mine owner's premises, while otherwise it would be a trespass. It is in the nature of a search warrant. The statute requires no record to be made of the survey, nor that a plat thereof and report be made in writing, or report made to either the circuit judge or court, neither that any such report be admissible in evidence. The duties of the circuit judge end upon the appointment of the surveyor, unless it be necessary to proceed against him for non-performance of duty by way of contempt of court. Clearly we think this plat and report were incompetent and should have been excluded; nor can we see that it did no harm, as is suggested by counsel for appellee, for the reason that the surveyor also gave oral evidence to the same matters, and especially as the survey and report carried with them apparent additional force and were well calculated to have controlling weight with the jury.

It appears to us from what the evidence fairly shows that

the jury must have allowed in its verdict at least \$300 for damages to appellee for drying up his well. This, we think, was manifestly against the weight of the evidence. The well failed of its water, it is true, after the mining operations under or near it, but it was a very dry season, and there had been a succession of dry seasons for several years, and many wells similarly situated in that neighborhood had failed in like manner. And at least another well under which the mine had been run, and a large artificial pond also mined under, were unaffected by the mine. Appellee's well, after rains came again, had a supply of water. The clay above the mine under the well seemed to be impervious to water, and there was a vein of coal also watertight between the bottom of the well and the mine. It does not seem reasonable that the digging of the mine drained the well. It is the merest conjecture that it failed on account of the digging of the mine, even if it was excavated under it.

We see no other reversible error in the record. The judgment of the court below is reversed and the cause remanded.

Niagara Ins. Co. v. Bishop.

1. *Insurance—Appraisement Clause—Condition Precedent.*—Where an appraisal clause in a contract of insurance provided that in the event of a disagreement as to the amount of loss between the insurer and the insured, the loss should be ascertained by two disinterested appraisers, the insured and the company each selecting one, who were first to select an umpire, with power to decide any difference between them, *it was held* that the provision was legal and that a compliance therewith was a condition precedent to the bringing of the suit to recover damages for a loss under the policy.

2. *Insurance—Sixty Days Limitation.*—A clause in a policy of insurance, providing that no loss shall become payable until sixty days after the making of the appraiser's award, where an appraisal is required under the terms of the policy, is a legal limitation, and a compliance therewith is a condition precedent to the bringing of the suit upon the policy.

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3. *Insurance—Responsibility for Neglect of Appraiser*—Under a policy of insurance containing a provision that in case of disagreement as to the amount of the loss, it should be referred to two disinterested appraisers, and a loss occurring, the parties were unable to agree, each selected an appraiser under the policy to make an estimate for them, who entered upon the performance of their duties, but were unable to agree, and having failed to select an umpire, the proceedings were abandoned, it was held that the responsibility of the case was upon the party representing the appraiser who neglected his duty.

4. *Insurance—Duty of Appraisers under the Policy*—A policy of insurance contained a clause that in the event of a loss, as to the amount of loss, the amount should be ascertained by two disinterested appraisers, as a condition precedent to bringing an action on the policy, the appraisers, when appointed, stand for the parties; if either improperly neglects his duty, the party is responsible for such neglect. If either insists upon unreasonable requirements which have the effect to defeat the appraisal, he is responsible therefor; and in case the appraiser representing the insurance company acts in such bad faith as to prevent an accurate appraisal within a reasonable time, the insured is not bound to farther compliance with the provisions of the policy and may sue for the loss at once.

5. *Practice.—Admission of Evidence in Trials by Jury*—The importance is attached to the improper admission of evidence which is tried by the court. In such cases it is usual to allow the evidence offered in proof more freely than in cases of the trial before a jury.

Memorandum.—Action on policy of insurance. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge. Heard in this court at the May term, A. D. 1893, and affirmed December 12, 1893.

APPELLANT'S BRIEF, PADEN & GRIDLEY, ATTORNEYS,
L. PADDOCK, OF COUNSEL.

"While, however, it is perfectly well settled that an agreement that contemplates the exclusion of a party from a suit at law is invalid, there is no doubt that any agreement as to the mode of settling the amount of loss, or the time for bringing the action, or any particulars of that nature which do not go to the merits of the action, but are preliminary in aid thereof, is in substance, an agreement that at the trial of an action shall not be lawful for either party to enter into the

the amount of the loss, but that it shall always be settled by reference, and that the only question to be tried at law shall be the right to recover, is valid. A distinction is made between an agreement to refer every matter in dispute to arbitration and one to pay such a sum as the damage shall be found by a third party to amount to, which latter operates to reduce the policy from a contract to pay the amount of damage absolutely, and to substitute the arbitrator for the jury to ascertain its amount." May on Insurance, Sec. 493. See, also, Ostrander on Law of Fire Insurance, 214. Burch on Fire Insurance Contract, 318; Wood on Fire Insurance.

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. *Scott v. Avery*, 5 H. L. Cas. 811; *Viney v. Bignold*, L. R. 20, Q. B. Div. 172; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572, 576; *Wolf v. Liverpool & London & G. Ins. Co.*, 50 N. J. L. 453; *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 114. The case comes within the general rule long ago laid down by this court: 'Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect.

He can not compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. *United States v. Robeson*, 9 Pet. 319.'" *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549.

"A general provision that all disputes which may arise in the execution of a contract shall be decided by arbitra-

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tors, will not be allowed to deprive the courts of their jurisdiction, but the parties to a contract may fix on any mode they may think fit to liquidate damages, in their own nature unliquidated, and in such case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it." *Old Saucelito Land and Dry Dock Co. v. Commercial Union Assurance Co.*, 66 Cal. 253.

"When it is agreed that no suit shall be maintained until an award has been had, fixing the amount of the claim, the agreement will be respected by the courts." *Adams v. Insurance Co.*, 70 Cal. 198; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297.

If defendant refused compliance, then suit could be brought against it immediately. We hold the agreement reasonable and legal. It is sustained by the clear weight of authority." *Canal Co. v. Coal Co.*, 50 N. Y. 252; *Insurance Co. v. Wolff* (N. J.), 14 Atl. Rep. 561; *Dry Dock Co. v. Union Assurance Co.*, 66 Cal. 253; *Davenport v. Insurance Co.*, 10 Daly, 535; *Gauche v. Insurance Co.*, 4 Woods, 102; *Carroll v. Insurance Co.*, 13 Pac. Rep. 865; *Holmes v. Richet*, 56 Cal. 307; *Scott v. Avery*, 8 Welsb. H. & G. 487; *Insurance Co. v. Creighton*, 51 Ga. 95; *U. S. v. Robeson*, 9 Pet. 319; *Lovejoy v. Insurance Co.*, 11 Ins. Law J. 186; *Wood Ins., Sec. 493*; *Gasser v. Sun Fire Office* (Minn.), 44 N. W. Rep. 252.

"The arbitration clause was a barrier to recovery at law, without proving a demand for arbitration by the insured, and a refusal or neglect, or an express waiver." *Flaherty v. Germania Ins. Co.*, 1 W. N. C. 352 (Pa.)

"The condition of the policy relating to the ascertainment of the amount of loss or damage is, unless waived, a condition precedent to the right of plaintiff to recover." *Eichner v. L. & L. & G. Ins. Co.*, 9 N. Y. Sup. 954; see also *Scottish Union & Natl. Ins. Co. v. Clancy*, 8 S. W. Rep. (Texas) 630; *Smith v. Briggs*, 3 Denio 73; *McMahon v. N. Y. & Erie R. R. Co.*, 20 N. Y. 463; *Herrick v. Belknap*, 27 Vt. 673; *Strong on Eq. Jur.*, Sec. 1457a; *Scott v. Corporation of Liverpool*, 3 De Gex & J. 344; *Brown v. Overbury*,

11 Exch. 715; Tridman v. Holman, 1 Hurls. & Colt. 72; Braunstein v. Accidental Death Ins. Co., 1 Best & Smith, 101; Mosness v. German Am. Ins. Co., 52 N. W. Rep. (Minn.) 932; Gasser v. Sun Fire Office, 42 Minn. 315; Pioneer Mfg. Co. v. Phoenix Ins. Co., 106 N. C. 28; Wolff v. L. & L. & G. Ins. Co., 50 N. J. 453; Scott v. Avery, 20 Eng. L. & Eq. Rep. 334; Gorman v. Hand in Hand Ins. Co., Irish Rep. 11 C. L. 224; Elliott v. Royal Exchange Assurance Co., L. R. 2 Ex. (Eng.) 237; Viney v. Bignold, L. R., 20 Q. B. Div. (Eng.) 172; Lantalum v. Anchor Marine Ins. Co., 22 N. B. R. 14; The President et al. v. The Pennsylvania Coal Co., 50 N. Y. 250; United States v. Robeson, 9 Pet. 327.

APPELLEE'S BRIEF, BOTSFORD & WAYNE, ATTORNEYS, CHARLES
WHEATON, OF COUNSEL.

"It can not avail either party that an umpire was not chosen before proceeding with the appraisal. The umpire here can act only after disagreement of the arbitrators. Until then an umpire is unnecessary. He can act as well and with the same effect if appointed when such controversy occurs. The time, therefore, fixed in the contract, is not essential or material." Chandos v. American Ins. Co., 54 N. W. Rep. 390.

The time when an act is to be done, either by contract or law, is not essential when it may be done as well later. Hall v. Delaplaine, 5 Wis. 206; McCullough v. Phoenix Ins. Co. (Mo.), 21 S. W. Rep. 207.

Justice and fair dealing did not require the plaintiffs to wait longer than they did before instituting their suit. Bishop v. Insurance Co., 130 N. Y. 488, 29 N. E. Rep. 844; Uhrig v. Insurance Co., 101 N. Y. 362, 4 N. E. Rep. 745.

"Under the arbitration clause it was the duty of each party to act in good faith to accomplish the appraisement in the way provided in the policy, and if either party acted in bad faith, so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and

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if either party refused to go on with the arbitration, or to complete it, or to procure the appointment of an umpire, so that there would be an agreement upon an appraisal, the other party was absolved. A claimant under such a policy can not be tied up forever, without his fault and against his will, by an ineffectual arbitration. *Uhrig v. Ins. Co.*, 101 N. Y. 362.

STATEMENT OF FACTS BY THE COURT.

On the 4th of January, 1891, appellant issued a policy of insurance to appellee insuring him against loss by fire to his ice house building on the bank of Fox River, near Elgin, until the 4th of July, 1892, to the amount of \$1,000. The policy contained the following provisions:

“This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; such ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers as hereinafter provided. * * *

In the event of a disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of such loss. * * * This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by any requirement, act or proceeding on its part, relating to the appraisal or any examination herein provided for; and the loss shall not become payable until

sixty days after notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers where appraisal has been required. * * * No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months after the fire."

The property was entirely consumed by fire on the 8th of February, 1892. Appellee at once notified the company's general agent and adjuster at Chicago, Mr. Hugh Martin, who visited the ruins, and with appellee endeavored to make an estimate of the loss. Considerable time was consumed by the parties in trying to effect a settlement, but they were unable to agree. Appellee then made proofs of loss and demanded the appointment of appraisers under the terms of the policy.

On the 10th of June, 1892, appellant appointed one John H. Doulin, of Chicago, appraiser in its behalf and notified appellee. Appellee selected one, Smith Hoag, of Elgin, appraiser in his behalf. The appraisers, without first selecting an umpire, as the policy provided, visited the ground and began an estimate of cost of material and construction. They differed widely, and after a few days Doulin returned to Chicago without agreeing upon an estimate. After it became evident that the appraisers could not agree, the appointment of an umpire was discussed, but none was elected, for the reason that they would not agree upon the locality from which he should be selected.

On the 10th of August, 1892, appellee brought suit upon the policy. In addition to other pleas, the company pleaded specially the inability of the parties to agree, the appointment of appraisers, and that the appraisal was still pending and undetermined. Appellee replied that the company had refused without good and sufficient cause to complete the appraisal, and that none was pending. The case was tried by the court without a jury. The court found the issue for appellee, and returned judgment in his favor and against the

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company for \$910.71. The company appeals asks a reversal because of improper rulings of evidence, refusal to hold propositions of law, the verdict is contrary to the law and evidence and the verdict is excessive.

OPINION OF THE COURT, HARKER, P. J.

The main question involved in this controversy raised by the special pleas, that the action was brought before the appraisal undertaken by appraisers was completed, and while such appraisal was in progress the special replication that the completion of the appraisal was defeated by the delay and unfair action of the company and its refusal without sufficient cause to complete the same.

The appraisal clause in the contract of insurance provided that in the event of a disagreement as to the amount of loss between the insured and the insurer, the loss was to be ascertained by two disinterested appraisers, one selected by the company each selecting one, who were to act as umpire, with power to decide any difference between them. Another clause provided that no loss should be payable until sixty days after the making of the appraisal award where an appraisal had been required. These provisions are legal, and that a compliance therewith is a condition precedent to the bringing of suit, is held in an unbroken line of decisions in this country.

See, *Insurance Law*, Sec. 493; *Wood on Insurance*, 493; *Jones v. Humboldt Ins. Co.*, 91 Ill. 92; *Hamilton v. L. & F. Ins. Co.*, 136 U. S. 242; *Adams v. Insurance Co.*, 198; *Reed v. Washington Ins. Co.*, 138 Mich. 198; *Liverpool & L. G. Ins. Co.*, 50 N. J. 453; *Daly v. Insurance Co.*, 10 Daly 355.

We do not care to express any opinion as to the propriety of either appellee or the adjuster in their estimate upon an estimate, a matter discussed with counsel by counsel. It is sufficient to say they were not bound to do so and that each selected an appraiser to make

for them, and that the appraisers entered upon a discharge of the office to which they had been nominated.

As we view the case the only question of importance is, which of these appraisers is responsible for the suspension of their work and the failure to complete the appraisal? When appointed they stood for the parties appointing them. Hoag for Bishop and Doulin for the company. If either improperly neglected his duty, the party appointing him was responsible for such neglect. If either insisted upon an unreasonable requirement which had the effect to defeat an appraisal his principal was responsible therefor. If either refused to go on with the work, or acted in such bad faith as to prevent the accomplishment of the appraisement within a reasonable time, the principal of the other appraiser was absolved from further compliance with that provision of the policy. In that case, it must be said, the proceedings for appraisal were not pending but had been abandoned.

It is, perhaps, unfortunate that Doulin and Hoag did not at the outset select an umpire. They labored for two days trying to make an estimate without, but were so widely apart on the different items of construction that no agreement was reached. Doulin then returned to his home, insisting that it would be necessary to call in a third man. Instead of returning to Elgin and making further effort toward an appraisement, he wrote to Hoag in a few days proposing payment of a certain sum for the loss, which Hoag declined as unreasonable and unjust. Hoag wrote asking him to return, expressing the opinion that they could, after going through the entire estimate, reach an agreement.

An umpire was not selected then because Hoag urged the appointment of a man from Elgin, or the county in which the ice-house was located, while Doulin urged the appointment of a man from Chicago, Bloomington, or elsewhere out of the county. Hoag objected to the men proposed by Doulin, because they were from a distance and he knew nothing of their fitness for the place. Doulin objected to the men proposed by Hoag, as they were local builders and Hoag knew them. One of them lived at Aurora,

Chicago, M. & St. P. Co. v. Kendall.

1. *Evidence—Effect of Improper, Cured by Instructions.*—In an action against a railroad company for killing horses, the plaintiff was allowed to introduce evidence of the condition of the fence through which it was claimed they got upon the track, for a considerable distance from the place in question, along the lands of the plaintiff, and for years prior to the accident. *It was held*, that such evidence was irrelevant; but, an instruction being given to the jury at the instance of the defendant, that they had “no right to consider in coming to a conclusion in the case, whether or not the fences of the defendant were good or poor, sufficient or insufficient, on the sides of its right of way adjoining the premises of the plaintiff, other than the panel of fence through which the animals got the night they were injured,” *it was held* that this instruction properly eliminated the objectionable evidence from the case, and that no harm resulted to the defendant from its admission.

2. *Practice—Exception to Evidence.*—If the party desires to avail himself of the introduction of incompetent evidence, he must object to the same in apt time, and except to the ruling of the court in passing upon his objection.

3. *Evidence—Weight to be Given to Testimony.*—Where, in an action against a railroad company for killing horses, a witness testified that he knew the value of horses generally in the vicinity, and had seen the horses about which he testified, the cross-examination developed the fact that he had but little knowledge on the subject, and slight opportunity to judge of the value of horses, *it was held*, that the cross-examination only affected the weight to be given to it, but did not render it incompetent.

4. *Evidence—Competency as to Stock Killed.*—In an action against a railroad for killing domestic animals, it was shown that a witness was competent to testify upon the subject of values; that he had heard the animals described in the suit by the plaintiff and others, and was asked what was a fair cash value of the animal killed, but was not permitted to answer. *It was held*, that the witness had not brought himself within the rule, for at the time the question was asked it had not been shown that he had heard all the evidence on the subject about which his opinion was asked.

5. *Evidence—Hypothetical Questions as to Values.*—Where a hypothetical question is put to a witness for his opinion in regard to the value of an animal, the question must be full enough to form a basis for an opinion, and must omit no important qualities of the animal affecting its value, about which there is no dispute, and which would necessarily influence an opinion.

6. *Evidence—Photographs of Premises in Question.*—Upon the trial of an action against a railroad company for killing domestic animals

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which had got upon their track through a defect in the fences adjoining the same, the court refused to admit in evidence a photograph of the broken fence boards, the broken boards being in court and offered in evidence. *It was held* that the photographs, which exhibited only a partial view of them, were properly refused.

7. *Instructions—Reference to Other Instructions in the Case.*—An instruction which refers to the other instructions in the case, and which does not require the jury to believe any fact from the instructions, but merely informs them that “if, under the evidence and instructions, they believe the defendant liable and give a verdict for the plaintiff, they shall assess the damages,” is proper.

Memorandum.—Action for killing domestic animals. Appeal from a judgment rendered by the Circuit Court of Ogle County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, E. F. DUTCHER, ATTORNEY.

The party asking an opinion of an expert may, within reasonable limits, put his case hypothetically as he claims to have been proved, and take the opinion of the witness thereon, leaving the jury to determine whether the case as put is the one proved. In this case there was no controversy as to description of the mares killed. *Bishop v. Spining*, 38 Ind. 149; *Guetig v. State*, 66 Ind. 94; *Goodwin v. State*, 96 Ind. 550; *Cowley v. People*, 83 N. Y. 464; 38 A. Rep. 464.

Experts may give their opinions on the value of an article. Thus the owner of a cloak may testify to its value by the knowledge she has obtained in pricing similar cloaks, although she never bought but one. *State v. Finch*, 70 Ia. 316; *Printz v. People*, 42 Mich. 144; 36 Am. Rep. 437; *Berncy v. Dinsmore*, 141 Mass. 42; 55 Am. Rep. 445.

They may give the value of a dog, based either upon actual sales or their general knowledge. *Cantling v. Hannibal etc., R. R. Co.*, 54 Mo. 385; 14 Am. Rep. 476. Same of horses, breeds, values, etc. *Harris v. R. R. Co.*, 36 N. Y. Super. Ct. 373. Same of land. *Clark v. Baird*, 9 N. Y. 183; *Bearss v. Copley*, 10 N. Y. 93.

It is not necessary to qualify a witness to testify as to values, that it should be of such direct character as would make it competent as primary evidence. It is the experience which he acquires in relation to the value of animals and other things by being engaged in the business or knowing of it, that qualifies him to testify. *Whitney v. Thacher*, 117 Mass. 526; *Stone v. Tupper*, 58 Vt. 409; *Haish v. Payson*, 107 Ill. 365.

J. C. SEYSTER and R. J. SENSOR, attorneys for appellee.

OPINION OF THE COURT, CARTWRIGHT, J.

This suit was brought by appellee to recover damages from appellant for killing two horses and injuring a colt, the property of appellee. The declaration charged a liability of appellant on the ground that its fence was insufficient where the stock went through it. Appellee recovered \$290 for damages and attorney's fees.

The particular place where the stock went through the fence was identified, and was not in dispute. The court, against the objection of the defendant, allowed the plaintiff to introduce evidence of the condition of the fence for a considerable distance from the place in question along the lands of the plaintiff, and for years prior to the accident. Such evidence was irrelevant to the issue touching the liability of defendant that was being tried. The plaintiff did not suffer the injury complained of on account of the condition of the fence at other times and places. The plaintiff was not entitled to prove a general neglect of duty in respect to fences across his lands not resulting in the injury sued for. *C., B. & Q. R. R. Co. v. Farrelly*, 3 Brad. 60; *Wabash R. R. Co. v. Kime*, 42 Ill. App. 272; *P. D. & E. Ry. Co. v. Aten*, 43 Ill. App. 68.

But an instruction was given the jury; at the instance of defendant, that the jury had no right to consider, in coming to a conclusion in the case, whether or not the fences of the defendant were good or poor, sufficient or insufficient, on the sides of its right of way, adjoining the land and premises of plaintiff, other than the panel of fence which

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the animals got through the night they were killed or injured. In view of this instruction, which practically eliminated the evidence from the case, we do not think that any harm resulted from its admission.

Plaintiff testified to a conversation between himself and the section foreman of defendant, who had charge of the fence, concerning its condition. It is argued that this evidence was incompetent; but the record shows no exception to rulings of the court as to the conversation, except a ruling that if plaintiff notified the section foreman of the condition of the fence, he might testify to that fact. That holding was correct, and as no other exception was saved, the other objections made here will not be considered.

It is contended that the court erred in admitting the testimony of witnesses on the part of the plaintiff as to the value of the animals, and in refusing to allow witnesses for defendant to testify to such value. The witnesses who testified for plaintiff on that subject said that they knew the value of horses generally in that vicinity, and had seen the horse about which they testified. Their testimony was competent, and their cross-examination, which developed the fact that some of them had but little knowledge on the subject, or slight opportunity to judge of the value of these animals, only affected the weight to be given to their testimony, but did not render it incompetent. The witnesses for defendant, who were not permitted to testify as to value, did not show that they had any knowledge of values, except the witness Rainey, who was a dealer in horses at a village near by. As to the witnesses who had no knowledge of the subject, the ruling was correct. Rainey showed that he was competent to testify on the subject, and that he heard the mares described in the suit by the plaintiff and others. He was then asked what was the fair cash value of the gray mare, but was not permitted to answer. The case of *Schneider v. Manning*, 121 Ill. 376, is relied upon as establishing the rule that this was a proper method of examination; but if it was there intended to hold that a witness may give an opinion based upon hearing the evi-

dence, and considering such facts as he can recollect as having been testified to, the witness in this case did not bring himself within the rule; for, at the time the question was asked, he had not shown that he had heard all the evidence on the subject about which his opinion was asked. A hypothetical question was then put to the witness, but the question was not full enough to form a basis for an opinion, and omitted important qualities about which there was no dispute affecting value, and which would necessarily influence an opinion, such as, that the gray mare was a nice, stylish family mare, that a girl was accustomed to drive in safety. There was no conflict in the evidence as to the qualities of the mare, and no dispute on that subject out of which opposing theories could be framed as to the facts, and there was such a partial statement of undisputed facts as to render the question objectionable.

It is also objected that the court refused to admit in evidence, a photograph of the broken fence boards. The broken boards were brought into court and offered in evidence, and the photograph, which exhibited but a partial view of them, was properly excluded.

There was a conflict in the evidence as to whether the boards, when found the next morning after the accident, were attached to the posts at each end, and had been broken in the middle, were sound and sufficient, or whether they had become detached from one post on account of decay and insufficient fastening. It was the peculiar province of the jury to determine this question of fact, and we will not disturb their finding.

We see no objection to the fourth instruction for the plaintiff, which is criticised by counsel because it refers to the instructions. It does not require the jury to believe any fact from the instructions, but merely informs them that if under the evidence and instructions, they believe the defendant liable, and find a verdict for plaintiff, then they shall assess the damages.

Finding no reversible error in the record, the judgment will be affirmed.

Mann v. Harrison.

Mann v. Harrison.

1. *Decrees—In Part Erroneous.*—Where a decree is in part erroneous as to the findings of the trial court, but otherwise correct, it will be reversed as to such erroneous findings, and affirmed in other particulars.

Memorandum.—Foreclosure proceedings. Appeal from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

J. F. SANFORD, attorney for appellant.

MORRISON & WOOSTER, attorneys for appellee.

OPINION OF THE COURT, LACEY J.

This is an original bill of foreclosure by Elizabeth Harrison, executrix of the last will and testament of George Harrison, deceased, v. Allen H. Mann and William T. Harrison and William Mann et al., to foreclose a mortgage given by William T. Harrison and Allen H. Mann to Thomas J. Hollister, and assigned to George Harrison, and also one given to George Harrison, deceased, William Mann being a junior mortgagee and also an equitable holder of an undivided one-half of the title, subject to appellee's mortgage. There is no dispute as to the rightfulness to foreclose the mortgage in this case; we refer to the case of Allen H. Mann v. William Mann et al., No. 2530, in which we have filed an opinion at this term of court, which we refer to as a full explanation of the facts of this case. That case is a cross-bill filed in this, and for errors of the court below the decree has been reversed and cause remanded. The decree, in this case, so far as the foreclosure of the mortgage is concerned, is correct and without error, but the findings of the decree as follows, to wit: "And the court doth further find, defendant William Mann,

holds two notes against the defendants William T. Harrison and Allen H. Mann, each bearing date April 13, 1883, one for the principal sum of \$500, and one for the principal sum of \$2,300, falling due five years after, and drawing six per cent per annum, and that there have been no payments on the said notes, and that there is now due to the said William Mann from the said Allen H. Mann and William T. Harrison, etc., the total sum of \$4,447.32. And the court also ordereth that the surplus be brought into court and paid to William Mann," etc. We find that the findings of the court, above set forth, so far as that there have been no payments made to William Mann, and the amount found due him, and the decree ordering him to be paid out of the surplus mentioned in the decree, are erroneous; therefore, the decree, so far as such erroneous findings and order are concerned, is reversed, but in every other particular, it is affirmed.

Sharp et al. v. Babcock.

1. *Trial by the Court -- Conflict of Testimony.*—Where there is a conflict of testimony in a trial by the court without a jury, it is the peculiar province of the court to decide the controversy between the parties and such decision will not ordinarily be disturbed.

Memorandum.—*Scire facias* to foreclose mortgage. Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Heard in this court at the May term 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

R. C. HUNT and PRINCE & WELSH, attorneys for appellants.

WILLIAMS, LAWRENCE & WILLIAMS, attorneys for appellee.

OPINION OF THE COURT, HARKER, P. J.

This is a *scire facias* to foreclose a mortgage given by

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appellants upon real estate situated in the city of Galesburg, to secure the purchase money for the same to appellee and others, heirs of Alfred Babcock, deceased. The note secured by the mortgage was for \$5,100, and interest at seven per cent from November 13, 1886. All had been paid except \$100 and the interest on that sum. Payment of that was refused, upon the ground that appellee had falsely represented to appellants at the time of the sale of the land, that he and other grantors were absolute owners of a strip of ground five feet wide on the south side of the tract sold, and that that strip could be sold to one John Wax for \$250, and that on such representations they had purchased the strip for \$100, which constituted that much of the note for \$5,100. The defense interposed to the foreclosure of the mortgage was upon that line. The court found against appellants and entered a decree of foreclosure for amount due, as principal, interest and attorney fee, \$169.92.

The evidence shows that negotiations were pending sometime between the parties for a sale of a piece of ground inherited by appellee and others. Appellants had agreed to pay \$5,000 for it, but broke their agreement and refused to take it at that price. Appellee then came from his home at Des Moines, Iowa, and had the land surveyed and platted into lots, preparatory to putting it on the market. Appellants again offered \$5,000 for the land. Appellee agreed to sell, as he testified, on their paying \$100 additional for the expense and trouble he had been put to by their breaking their agreement. He testified that the price then agreed upon was \$5,100; that the land was sold for that sum, a warranty deed being executed for it, and that no part of the \$5,100 was in consideration of a purchase of the five feet strip which was quit-claimed at the same time. He was corroborated by his agent, Edward Taylor. He also denied that he represented to appellants that he and the other grantor owned the strip and that it could be sold to John Wax for \$250. He was contradicted by both of the appellants, who testified that they would not have made the trade but for such representations.

We think the court could rightfully find that the truth was with appellees.

In the conflict, it was his peculiar province to decide between them, and we do not feel warranted in disturbing his finding. Decree affirmed.

Mann, Assignee, etc., v. Reed.

1. *Execution—Must Be Under Seal.*—An execution issued from a court of record, which lacks the seal of the court, is void.

2. *Chattel Mortgages.*—A chattel mortgage which covers a stock of merchandise which is to be sold and disposed of in the ordinary course of trade, is fraudulent and void as against other creditors of the mortgagors.

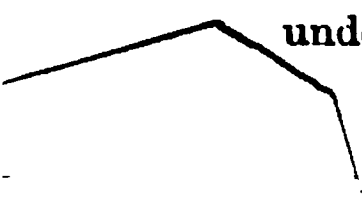
3. *Assignment for the Benefit of Creditors—Acknowledgment and Record.*—An assignment for the benefit of creditors is valid without being acknowledged or recorded, or without the assignees giving a bond. There are no negative words in the statute, and as the acknowledging and recording are not an essence of the thing done, and the substantial purposes of the act may be accomplished without either, these provisions of the law are directory only, and the assignee may act without giving bond as a *de facto* assignee.

4. *County Court—Jurisdiction in Assignments for the Benefit of Creditors.*—The County Court has jurisdiction to order a sheriff to make a return of assigned property to the assignee, which has been illegally levied upon after the assignment.

5. *County Courts—Power to Determine the Extent of Their Jurisdiction.*—A County Court has jurisdiction in the first instance to determine what interest passes to the assignee. It is inherent in all courts in general to determine the extent of their own jurisdiction, subject to reversal for error in judgment. Where a writ of execution is issued from another court and is levied on property assigned, and such writs for any reason do not create valid liens, the assignee may, under the order and direction of the County Court, institute proceedings in the proper forum for the recovery of the property.

6. *Notice to Agent, Notice to Principal.*—It is a principle of law that the principal is held to the notice acquired by his agent for all facts coming to the knowledge of such agent in the course of his employment.

7. *Assignment for the Benefit of Creditors—Policy of the Law.*—It is the policy of the statute to expose and correct frauds, for the benefit of creditors, and compel equal distribution of the proceeds of the assets under the assignment, rather than to declare the assignment void.



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Hence the statute provides that all provisions in the deed of assignment preferring creditors, shall be void.

8. *Assignment for the Benefit of Creditors.—Office of Recording, etc.*—While the statute requires an assignment for the benefit of creditors to be recorded, the only office of the record is constructive notice of its having been made, and when there is actual notice of the assignment the same rule as to taking possession by the assignee of the assigned property prevails in the one case as in the other.

9. *Assignee—When His Authority Begins.*—The person named in a deed of assignment is the legal assignee from the time he receives the assignment and commences to act under it, and is fully qualified to act as such from that time; and if he is endeavoring to get possession of the assigned property, it will be illegal for the holder of the chattel mortgage to seize it and thereby deprive the assignee of the custody of it, as it would be illegal to deprive the County Court of the jurisdiction, and in such cases the County Court would have power to order it returned to the assignee, he being the agent of the court.

10. *Chattel Mortgage—Power of Sheriff Under.*—It is no part of the sheriff's duty to foreclose a chattel mortgage, and if he does foreclose one he occupies the position of the private agent of the holders of the mortgage.

11. *Assignment—Improper Preferences.*—If a creditor has sought to obtain an improper preference, it will be the duty of the court to disallow it, and put his claim upon an equal footing with other creditors. It is the duty of the sheriff to aid the court in this particular, and not to endeavor to obtain improper preferences over judgment creditors who have caused executions to be placed in his hands.

12. *Tacking Possessions—Priority of Liens—Executions and Chattel Mortgages.*—An officer had two executions in his hands and with them went to the store of the defendants, and, entering, announced that he levied upon the goods. He then left the store for a short time. During his absence the defendants made an assignment for the benefit of the creditors and delivered it to the assignee who took possession of the goods and posted a notice to that effect. When the sheriff returned he had a chattel mortgage under which he sought to take possession of the goods. *It was held*, that the assignee's claim to the property was prior in point of time to that of the sheriff as agent for the collection of the mortgage, and in case one possession could be tacked on to another at the termination of the first, the assignee would have the first right under the deed of assignment as he made the first attempt to gain such possession from the sheriff? He was therefore ahead in priority of time and the mortgage claim could gain no additional rights by being placed in the hands of the sheriff who held the execution.

Memorandum.—Petition under the act relating to assignments for the benefit of creditors. Appeal from the County Court of Kane County; the Hon. C. H. DONNELLY, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

BOTSFORD & WAYNE, and C. H. FISHER, attorneys for appellant.

IRWIN & EGAN, JOHN A. RUSSELL, and JOHN L. HEALY, attorneys for appellee.

OPINION OF THE COURT, LACEY, J.

This was a proceeding in the County Court, on the petition of the appellant, seeking to compel the sheriff of the county to turn over to him a certain stock of goods consisting of merchandise. The appellant was the assignee of Stolt & Coffin, insolvents, who had executed to him a deed of assignment for said goods for the benefit of their creditors. The County Court, on hearing appellant's motion to turn over the goods to him, overruled it, and dismissed appellant's petition. From this order of the County Court this appeal is taken and reversal asked. The petition avers that the deed of assignment of Stolt & Coffin was delivered to the appellant on the 3d day of December, 1892, at 12:25 o'clock, P. M., and that he took immediate possession of the store building and the assigned goods therein contained by posting upon the outside of the front door of the building the following card: "Store closed, in hands of assignee. J. P. Mann, assignee." That such notice remained on the door until the 5th of December, 1892, about 2 o'clock, P. M., when it was removed by the deputy sheriff and he ejected the appellant from the store and took exclusive possession. That while appellant held possession he proceeded to take an inventory of the goods, but was dispossessed, as stated, while so doing, by the deputy sheriff. The appellant tendered his assignee's bond in his petition. Indorsed on the petition was the consent of the First National Bank, the plaintiff in the first two executions against Stolt & Coffin, under which appellee had levied and claimed to hold the goods, "that the goods may be turned over to assignee, sub-

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ject to any prior liens that may exist by reason of the lien of said execution in its favor." Dated December 6, 1892, the same date of the filing of the petition in the County Court.

The appellee answered and claimed to hold the goods as sheriff under two executions issued from the judgments by confession, entered the same day from the City Court of Elgin, first, against J. F. Stolt and William Wahl for \$510, indorsed, received 12 m. December 3, 1892; and another execution issued from the same court, for \$3,507, against John F. Stolt, Augusta Wahl and William Wahl, received by the sheriff at 11 o'clock a. m. Both executions were indorsed, levied on stock and fixtures in store No. 12 in Grove avenue, being the store of the insolvents, December 3d, at 1:25 o'clock, p. m. Appellee also claimed to hold the goods under execution issued out of the same court in favor of Hood, Faulkrod & Co. against John F. Stolt and William H. Coffin, the insolvents, for the sum of \$8,632.43, received by the sheriff at one o'clock and fifty minutes, p. m., and indorsed by appellee as sheriff, levied on the said goods. This execution lacked the official seal of the court from which it was issued and was void. The appellee also claimed to hold the goods by virtue of a chattel mortgage executed by the insolvents to R. D. Johnson, assigned to Hood, Faulkrod & Co., which came to his hands shortly after the last of the two first executions was received, and was for the sum of \$8,657.39, and was dated April 6, 1892, and acknowledged and recorded the same day, and covered the goods in the store and certain fixtures. The chattel mortgage covered the goods which were to be sold and disposed of in the ordinary course of trade, and was therefore fraudulent and void as against other creditors of the insolvents and each of them, except, perhaps, as to the fixtures. The appellee, as sheriff, claims the writs and mortgage were severally levied on the said goods at the time they were received respectively, and that he has ever since held possession. The appellee admits that after the levy of the writs on the executions in favor of the First National Bank appellant claimed

to have a deed of assignment from Stolt & Coffin of said stock of goods, but denies he had possession. Appellee interposes the objection to surrendering the goods, that there was fraudulent collusion between the insolvent, appellant and the First National Bank, to allow the bank to obtain a preference as against other creditors. That no delivery of the assigned goods was ever made to appellant and that he was never in possession; that the assignment bears date December 3, 1892, and was filed for record December 5, 1892, and presented in County Court December 6, 1892, and that the assignment was void as against creditors.

There is no dispute from the evidence that, after the levy of the executions in favor of the First National Bank at 12:25 p. m., appellee, by his deputy, J. S. Tuttle, who made the levy or attempted levy, went out of the store, leaving appellant in charge, and at that time the appellee did not have the chattel mortgage in question but obtained it about 1:55 p. m. at the office of Tuttle, from Mr. Healy, an attorney; that Tuttle went back to the store and opened the door and found Stolt & Coffin absent and saw the notice set out in appellant's petition on the door, and asked appellant what it meant, and he said an assignment had been made to him since Tuttle had gone out. The disputed points are whether appellant had a joint possession of the goods with the appellee or whether he was acting solely as the custodian of the sheriff. It seems certain from the evidence, that after he received the assignment he claimed to have custody of the goods, while recognizing the rights of the sheriff to hold them under his levy of the bank executions, but nothing further. The deputy sheriff and appellant started to make an inventory.

It appears from the testimony of the deputy sheriff, Tuttle himself, that while the appellant was in the store claiming rights under the assignment, they agreed to take an inventory of the goods, and appellant was to take a copy of it, and they agreed on the young lady clerks in the store to make an inventory and were to give appellant a copy. Appellant was in the store until 5:30 p. m. Monday, taking

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at that time a copy of the inventory, and Tuttle ordered him not to do it, and then ejected him from the building.

Tuttle further testified that "I learned of the assignment when I went there (to the store) the second time, and Mann put the sign on the door after the execution and mortgage of Hood, Faulkrod & Co. came to my hands," but it was before he attempted to gain any possession under them. We think, however, the evidence shows it was before such possession of execution and mortgage.

On the other hand, it is claimed by the appellant, that the deputy sheriff failed entirely to make a levy on the bank execution the first time he came to the store, and that, as soon as he left, appellant got the deed of assignment and took exclusive possession of the goods. But afterward, we think the evidence shows he recognized the deputy's possession under the first two executions, though claiming the right to a joint possession under his deed of assignment, and this claim and his actual presence in the store, under such claim, was prior to the time appellee's deputy received the chattel mortgage, and prior to the time the deputy claimed any rights under the chattel mortgage, as agent in behalf of appellee, to foreclose it.

It is first important to determine whether the appellant's deed of assignment was valid, without being recorded, and without his having given bond prior to the filing of his petition. That question has been fully determined, affirmatively, in the case of *Farwell et al. v. Cohen*, 138 Ill. 216. The court said, in substance, that an assignment is valid without acknowledgment or recording. There are no negative words in the statute, and as the acknowledging and recording are not the essence of the thing done, and the substantial purposes of the act may be accomplished without it, those provisions of the act are held to be directory only; also the assignee may act, without giving bond, as a *de facto* assignee.

It is held, in *Farwell et al. v. Cohen*, *supra*, the requirement of acknowledging the deed of assignment is directory, and that the deed is valid without it; and the court

says that, when the deed of assignment is delivered, the assigning debtor does all he can, and that it takes effect when the possession of the property is delivered to the assignee, and this was in a case where there was no acknowledgment or recording. The same rule as to delivery is held in case the assignment is recorded. In *Lowe v. Matson*, 140 Ill. 108, where the assignment had been recorded, it was held that the recording of the assignment served as a constructive notice of the assignment, and while it held possession of the property by the assignee, was essential to his title against third parties, the same as had been held in cases decided by the court before. It was held that the conveyance by assignment was not like an ordinary sale of personal property, where retention of possession by the seller rendered the sale void for fraud *per se*; and that the assignee occupied the position of court receiver and had a reasonable time to get possession of the assigned goods, and, in the meantime, the transfer was complete and no other rights could intervene.

In *Yates et al. v. Dodge, etc.*, 123 Ill. 50, where the deed of assignment had not been recorded, it was intimated that actual knowledge by one seeking to acquire a lien on the assigned property by attachment, would operate the same as a record of the assignment, and the lien was sustained on the ground of absence of notice to the plaintiff in attachment. From these different decisions and the reasoning of the court, the conclusion is reached that the only office of a record of the assignment is constructive notice of its having been made, and that where there is actual notice of the assignment, the same rule as to taking possession by the assignee of the assigned property prevails in the one case as in the other.

What we shall say hereafter, in this opinion, will be on the basis that the appellant was a legal assignee from the time he received the assignment, and commenced to act under it, and was fully qualified to act as such from that time, and if he was endeavoring to get possession of the property in question, it would be illegal for the agent of the

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holder of a chattel mortgage to seize it, and thereby deprive the assignee of the custody of it, and it would be as illegal to deprive the County Court of the jurisdiction, and in such case the County Court would have jurisdiction to order it returned to the assignee, who is the agent of the court. So it was held by the Supreme Court in *Lowe v. Matson*, *supra*, that the County Court had jurisdiction to order a sheriff to make a return of assigned property to the assignee, which had been illegally levied upon after the assignment. A County Court has jurisdiction in the first instance to determine what interest passes to an assignee of the court. *Davis & Co. v. Chicago Dock Co.*, 129 Ill. 180. It is inherent in courts in general to determine the extent of their own jurisdiction subject to reversal by an Appellate Court for error in judgment. Where writs of execution are issued from another than the County Court, and are levied on property assigned, and such writs do not for any reason create valid liens, the assignee may, under the order and direction of the County Court, institute proceedings in the proper forum for the recovery of the property. *Ibid.* But, where an officer, holding such writs, improperly interferes with the jurisdiction of the County Court, and makes an unauthorized levy, then the County Court has jurisdiction to order a return of the property. *Lowe v. Matson*, *supra*.

The question before us is, did the County Court correctly decide in refusing to order appellee to turn over the property to the assignee? Conceding the City Court of Elgin had jurisdiction of the property in question levied on by appellee under the bank execution in the first instance, it, by the consent of the plaintiff, lost jurisdiction of the subject-matter of the levy on the assigned property. In such cases the County Court may deal with the property levied on "to all intents and purposes as if it had acquired possession of it prior to the levy," subject, however, to existing liens. *Plume & Atwood Mfg. Co. v. Caldwell*, 136 Ill. 163. The plaintiff in execution controls the possession of the officer, and may at any time allow the assignee to take possession of the property, he being substituted for the sheriff.

The execution of Hood, Faulkrod & Co., being void for the want of the seal of the court issuing it, renders it unnecessary to notice that levy. There remains to be considered the rights of the chattel mortgage in the hands of the appellee, and how far it could prevent the County Court from ordering the property to be turned over to appellant. As respects the mortgage appellee occupies the position of private agent of Hood, Faulkrod & Co., to foreclose it, it not being any part of a sheriff's legal duty to foreclose chattel mortgages.

What position did he occupy as such agent? The evidence shows that prior to the time he claimed to hold a qualified possession under the void execution or the mortgage, he had actual notice of the execution and delivery of appellant's deed of assignment from Stolt & Coffin. After he had made the levy on the first two executions he went away from the building where the goods were situated, and shortly afterward returned with the void execution and chattel mortgage, and before he attempted or could attempt any levy under them, he saw appellant's notice posted up on the outside door of the store building stating that appellant was assignee of Stolt & Coffin, and held the goods as such, and he was further informed that such an assignment for the benefit of creditors had been made. Thus actual notice supplies every species of constructive notice, such as a recording of the deed of assignment and actual possession of the assignee, and other such modes of notice. *Yates et al. v. Alice Dodge, Ex'x, supra*; *Lowe v. Matson, supra*. Tuttle, the deputy sheriff, by whom the levies were made for the sheriff, was the sub-agent of the appellee, acting for Hood, Faulkrod & Co., claiming a sort of possession under the mortgage, and had notice of the assignment as before stated. It is a principle of law that a principal is held to the notice acquired by his agent of all facts coming to the knowledge of such agent in the course of his employment. If, then, the holders of the chattel mortgage knew of the fact of the assignment, and by virtue of it, appellant was attempting to get possession of the assigned property under it, they would not be legally entitled to take pos-

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session of the property, and possession in such case would be illegal, especially if appellant had not had a reasonable time to take possession after receiving the deed of assignment. *Yates v. Dodge, supra*; *Lowe v. Matson, supra*. At the time the deputy sheriff was attempting to get possession, or a secondary possession, if such it can be called, under the chattel mortgage, appellant was resisting it, and was claiming a joint possession with the appellee, the sheriff, which the deputy well knew. It was held by the Supreme Court in *Hanchett v. Waterbury*, 115 Ill. 220, that "upon the making, filing and recording of the assignment with the lists, schedules annexed, the County Court wherein such assignment is filed and recorded by operation of law, at once acquires jurisdiction over, becomes possessed of all the property and estate embraced within the assignment, subject, of course, to all prior liens and just claims third parties may have upon it." It could not be permitted for appellee, as the agent of Hood, Faulkrod & Co., to run a race with the assignee for the possession of the property, even if it were not impossible by reason of appellee's prior possession under the execution. The assignee is the trustee of the creditors as well as the insolvent assignors; and the creditors should not be held responsible for any breach of duty on his part to the extent of authorizing other frauds to be committed. *Plume & Atwood Mfg. Co. v. Caldwell, supra*. This is a remedial statute, made to prevent fraud, and as itself declares, should be liberally construed to that end. *Railroad Co. v. Crane*, 102 Ill. 249. The appellee set up in his answer that an unjust preference was being attempted to be gained in favor of the bank by its collusion with the insolvents and the proposed assignee, and therefore the assignment was void. We think that would not be the case.

It seems to be the policy of the statutes for courts to expose and correct all frauds rather than to hold the assignment void for fraud, to correct fraud for the benefit of creditors, and to compel an equal distribution of the proceeds of the assets to the same, rather than to declare the assignment void. Hence the statute provides that all pro-

visions in the deed of assignment preferring creditors should be void. If the bank has sought improper preference it will become the duty of the court to disallow it, and put it on an equal footing with other creditors, and it should be the duty of the appellee to aid the court in that particular, instead of endeavoring to obtain other improper preferences for his principals.

There is no question of conflict of the County Court with any other court as to its jurisdiction. The only contest is between the appellee, as the agent or owners of the mortgage, and appellant, as the assignee of the goods in question. By the action of the plaintiff in the execution levied on the property, the sheriff has no right any longer to claim to be acting under the jurisdiction of the City Court of Elgin.

In respect to another view of the case where appellee claims possession of the goods as the agent of Hood, Faulkrod & Co., owners of the mortgage, we have to say that that claim has ceased to exist, and that he, as sheriff, has no option but to surrender the property as held by him into the hands of the assignee. He has no right to interpose any agency or other pretense to still hold the property. Having once surrendered it, as he is bound to do, what becomes of his claimed possession as agent for the holders of the mortgage? Appellee's acceptance of the chattel mortgage for collection was purely a private matter. He could not receive it like a second execution issued from the same jurisdiction. If he does accept it as an agent for collection, he must wait until he has done his complete duty respecting his levy and the collection of his execution before he can take possession of any portion of the property as agent. His mortgage can only be held to be collected in case there is a surplus after satisfying the executions; he has no right to omit any of his duties as sheriff for the benefit of such claim. He is a sworn officer, and must execute the duties of his office faithfully. Whatever the plaintiff in execution orders to be done to facilitate their collection, the sheriff is bound to execute. The holders of the mortgage have no rights or equities that ought to embarrass the plaintiff in executions

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in turning over the property to the assignee. The assignees of the mortgage, and the appellee, their agent, are in no better position than if some person other than the sheriff had had possession of the mortgage for collection. When the jurisdiction over the property and the levies thereon is given over to the County Court, the sheriff, as the agent of the mortgage holders, will simply hold it for collection without possession of the property. He will be obliged to present it to the assignee for payment, and if he refuses it, the appellee will be compelled to present it to the County Court for adjudication. The only party who had any claim or right to retain the property, as against appellant, was the sheriff, by force of the bank executions; his right, however, terminated after the consent of the plaintiff therein to surrender it to the assignee. The County Court obtains complete jurisdiction.

In another view of the case, the appellant's claim to the property as assignee, was prior in point of time to that of the appellee, as agent for the collection of the mortgage, and in case one possession could be tacked on to another so as to commence at the termination of the first, it will be observed that the appellant would have the first right under the deed of assignment, as he made the first attempt to gain such possession from the sheriff. He was, therefore, ahead in priority of time, and the mortgage claim could gain no additional rights by being placed in the hands of the sheriff who held the executions.

The extent of the rights of the holders under the mortgage to priority, is not now before us; that question will be a matter for settlement by the County Court.

From what has been said it will be seen that the County Court erred in not allowing appellant's motion for an order from the court requiring the appellee to turn over the assigned property to him; therefore, the order of the court below is reversed and the cause remanded with instructions to the court to grant the motion, and order the appellee to turn over the assigned property to the appellant.

Village of Gilberts v. Rabe.

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84 145

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98 *326

1. *Cities and Villages—Right to Amend Records of Proceedings.*—A village board has the right to amend the record of its proceedings at a subsequent meeting so as to correspond to the facts and make truth appear by supplying omitted facts. So held, where a village board amended the record of its proceedings at a previous meeting, so as to show the legal passage of an ordinance.

2. *Cities and Villages.—Record of Passage of Ordinance.*—The record of the proceedings of a village board, which recited that all the members were present and that the ordinance in question was passed unanimously, shows that the ordinance was legally passed.

3. *Legislative Bodies—Records—Amendments.*—A legislative body makes and controls its own record and decides for itself when it contains a true history of its proceedings. It may amend its record by the addition of omitted facts so as to make it show the whole truth and correspond with the facts; and this may be done from the personal knowledge of the members of the body.

4. *Vested Rights—Violation of Ordinances—Defective Records.*—The record of a village board did not show at the time an ordinance was violated that it had been passed by the affirmative vote of a majority of the board, but the record was subsequently amended so as to show the fact. *It was held*, that the person violating the ordinance was presumed to have known that the law authorized the board to amend its record, and he could acquire no vested right; that the prosecution for his wrongdoing should be governed by the record in its incomplete form. When he undertook to violate the ordinance, because he thought that the village would not be able to prove its passage, he took the risk of such proof being made and had no right to insist that it should not be made.

Memorandum.—Suit for violation of ordinance. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, OSCAR JONES AND JOHN A. RUSSELL,
ATTORNEYS.

It is deemed of so great importance to uphold the proceedings of public corporations, that courts are disposed to be as indulgent in allowing entries of their proceedings to be

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amended as is consistent with the safety of those whose interests will be affected thereby, and the power of clerks of towns and other municipal corporations to amend their records, while they continue in office, is well established by authority. *Samis v. King*, 40 Conn. 298; *Farrell v. King*, 41 Conn. 448; *People v. Brinkerhoff*, 68 N. Y. 259; *Halleck v. The Inhabitants of Boylston*, 117 Mass. 469; *Barr v. The Village of Auburn*, 89 Ill. 361; *County of Adams v. The City of Quincy*, 130 Ill. 566.

Such amendment relates back to the time of the passage of the ordinance or resolution in question. *McCormick v. Bay City*, 23 Mich. 457; *Commissioners v. Hearne*, 59 Ala. 371; *Starr v. Burlington*, 45 Iowa, 87; *Dillon on Municipal Corporations*, Secs. 231, 234, note 1.

Where the city clerk had failed to keep the record of the ayes and nays upon the adoption of a resolution by the common council, a *nunc pro tunc* entry of omitted proceedings may be caused to be made by the city council. *City of Logansport v. Crockett*, 64 Ind. 319.

IRWIN & EGAN, attorneys for appellee.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellee was prosecuted before a justice of the peace, by appellant, for the violation of its ordinance prohibiting the sale of intoxicating liquor without a license. Appellant was defeated before the justice, and an appeal was taken to the Circuit Court, where the case was tried by the court without a jury, and appellant was again defeated.

The facts were agreed upon by stipulation in the Circuit Court, and the only question in the case was concerning an amendment by the village board of the record of its proceedings in the passage of the ordinance. The village board consisted of six members. A meeting of the board was held July 31, 1890, and the record of that meeting, as originally made by a clerk *pro tem.*, recited that all the members, except one, were present, and that the ordinance in question was passed, but it contained no recital of the

manner of its passage. The ordinance was duly approved, and copies were posted. The defendant on three different occasions, between August 15, and December 2, 1890, sold intoxicating liquors contrary to the provisions of the ordinance. The prosecution was commenced December 23, 1890, and afterward, during its pendency, before the trial in the Circuit Court, at a regular meeting of the same board at which all the members were present, it was, by unanimous vote, ordered that the record of the proceedings at the meeting of July 31, 1890, should be corrected so as to correspond with the facts, by inserting after the word "passed," where the passage of the ordinance was shown, the word "unanimously," and the record was amended accordingly. The record was in like manner amended so as to show that the member not present at the opening of the meeting, came in and took his seat before the passage of the ordinance. The amended record before the Circuit Court, showed that all the members of the board were present at the meeting when the ordinance was passed, and that its passage was by unanimous vote.

That the village board had the right to amend the record of its proceedings so as to correspond with the facts and make the truth appear by supplying the omitted facts, is settled beyond controversy. *President and Trustees of Town of St. Charles v. O'Malley*, 18 Ill. 407; *Turley v. County of Logan*, 17 Ill. 151; *County of Adams v. City of Quincy*, 130 Ill. 566.

It is also the law that the record, as amended, showed that the ordinance was legally passed. *Barr v. Village of Auburn*, 89 Ill. 361.

It is argued here that the judgment of the court was right, because no proof outside of the record of the board was offered to show that the amended record was true. A legislative body makes and controls its own record, and decides for itself when it contains a true history of its proceedings. The board decided that the record, as originally made, was deficient, and that the addition of omitted facts should be made so as to make it show the whole truth and correspond with the facts. The addition was made from the

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personal knowledge of the members of the board, and when made so as to give a true history of the passage of the ordinance, it is no more required or admitted of outside parol proof than any other record of the board.

It is also contended, that, inasmuch as the record did not at the time the ordinance was violated, show that it had been passed by the affirmative vote of a majority of the board, the defendant acquired some sort of vested right to immunity, which could not be disturbed by the subsequent amendment, or that such subsequent amendment was *ex post facto* in its character and void as to him.

The purpose of the requirement that the vote should be entered in the journal was to furnish evidence that the ordinance was passed as required by statute. *Barr v. Village of Auburn, supra*. The record as originally made recited that the ordinance was passed, and it was approved, and published as an ordinance of the village. When defendant contemplated a violation of its provisions, ordinary prudence would require that he should ascertain whether it was in fact passed in the required mode. He is presumed to have known that the law authorized the board to amend its record by adding any omitted fact, and he could acquire no vested right that the prosecution for his wrong doing should be governed by the record in its incomplete form. When he undertook to violate the ordinance, because he thought that the village would not be able to prove its passage, he took the risk of such proof being made, and had no right to insist that the proof should not be made.

When the record was completed by adding the omitted fact that the vote on the passage of the ordinance was unanimous, the record had the same force and effect as though originally made as amended, and showed that the ordinance was legally passed July 31, 1890. *County of Du Page v. Martin*, 39 Ill. App. 298. It was in full force when it was violated by the defendant, and the completion of the record did not make that an offense which was not an offense when committed.

The judgment will be reversed, and the cause remanded.

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49	422
91	187

Economy Light and Power Co. v. Cutting.

1. *Waters—Damage from Overflow—Responsibility.*—Where a person leased water power from the authorities of the Illinois and Michigan canal, and for the purpose of making more power was permitted by the canal authorities to put flash boards on top of a dam in the Desplaines river, under the direction of the canal superintendent, thereby raising the water in the river and flooding an island used for garden purposes, causing damages to the crop thereon growing, *it was held*, that the company was not relieved of its responsibility by the consent of the canal authorities.

2. *Damages—Growing Crop—Overflow of Water.*—Where damages for the destruction of a growing crop is sought to be recovered, the measure of damages is the value of the crop as it was when destroyed, with the right to the owner to mature and harvest or gather it at the proper time. The value of the crop is a matter of estimate or conclusion of the mind to be arrived at from all the facts which would affect it.

3. *Damages—Elements in Arriving at Value of Growing Crops.*—In estimating the value of growing crops destroyed, it is proper to take into consideration the fact that the land was very fertile and productive and that it had produced, for a series of years, crops which were larger and brought better prices than the average.

4. *Damages—When Not Excessive.*—In an action for the destruction by an overflow of water, of two acres of cabbages, some small and some large enough to stop cultivating, half an acre of sweet corn, one acre of potatoes, and also tomatoes and cucumbers, and three acres of land prepared for setting with cabbage plants, the plants in hand ready for setting, the jury assessed the damages at \$577.80. *Held*, not excessive.

Memorandum.—Action for damages caused by overflow of water. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBBEL, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

Instruction on the measure of damages referred to in the opinion of the court:

“If the jury, acting under the instructions and evidence, find for the plaintiff, and if they further find that the acts complained of in the declaration are proved, and that by such acts plaintiff was deprived of the use of the premises for the remainder of the season in which the overflow occurred, and that by said acts plaintiff's crops growing on said premises were wholly destroyed, then the measure of damages is as fol-

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lows: 1st. For the land plaintiff was prevented from tilling or using, if any, its rental value for the rest of the season, if the same is shown in evidence. 2d. For the land where the crop was up, more or less matured, the rental value for the rest of that season, the cost of labor, seed and plants, expended thereon, and the cost of any labor she had bestowed thereon after the planting, if the same is shown in evidence; or, in lieu of the compensation specified in this second paragraph, the value of the crop at the time of its destruction, with the right to the owner thereof to mature the crop and harvest or gather it at the proper time, if the same is shown in evidence. If any witnesses who testified for the plaintiff have given any other basis for estimating plaintiff's supposed damages than those given in these instructions, the jury are directed to disregard such basis and the estimates and testimony founded thereon, and to exclude the same from their consideration of this case."

C. W. BROWN, attorney for appellant.

APPELLEE'S BRIEF, JOHN C. PATTERSON AND JOHN S. REYNOLDS, ATTORNEYS.

Every injury by means of a water course by throwing the water back upon another riparian owner above is repugnant to the maxim *sic utere tuo alienum non lædas*, and a species of tort, denominated a "*nuisance*." See Angell on Water Courses, Chap. 10, Sec. 388, p. 555, 7th Ed.

The rule of damages announced by the court in his instruction to the jury is approved by this court in *K. & S. Ry. Co. v. Horan*, 17 Brad. '650.

OPINION OF THE COURT, CARTWRIGHT, J.

This is a suit by appellee against appellant for damages occasioned by appellant flooding her land with water. She obtained a verdict for \$577.80, on which judgment was entered.

On the trial it was proved that plaintiff was the owner of an island in the Desplaines River, a short distance above the junction of that river with the Illinois and Michigan canal at Joliet. Below such junction the river constituted a portion of the canal, and was adapted to such use by a dam across the river about a mile below the junction for the purpose of navigation. The island contained about fourteen acres, and part of it was used for garden

purposes. The defendant used water power at this dam leased from the canal authorities. In the spring of 1891, the basin above the dam had become so filled with sediment that the passage of water through the flumes was obstructed, and the dam in consequence did not afford as much power as the defendant wanted. The defendant was entitled to use whatever water was wasted at the dam, and not used in navigation. The canal superintendent promised the defendant to dredge out the basin, but the dredges were farther down the canal, and it was not convenient to bring one up, and therefore the defendant, for the sole purpose of making more power for its use, was permitted to put on top of the dam, under the direction of the canal superintendent, flash-boards, thereby raising the head of water about fifteen and one-half inches, which was subsequently reduced to about twelve and one-half, and afterward to six and one-half inches. The flash-boards, when first put on, flooded the island by raising the water in the river, and caused the damages sued for.

It is contended that defendant was not liable for any damages whatever, for the reason that it put the flash-boards on the dam under authority of the canal superintendent, and that the canal commissioners having control of the dam with power to keep it in condition and repair for use would not be liable for the act. It is true that the work was done under the superintendence of the canal superintendent, who directed how it should be done, but it was done by the defendant and paid for by it. It was not done for any purpose of navigation, or for any public purpose, but at the instance of and by defendant in order to get more power for its use. The evidence did not show that the canal commissioners did anything, and the canal superintendent merely controlled the manner in which the defendant did the work which it was permitted to do for its own benefit. We are of opinion that defendant was not relieved of responsibility by the consent of the canal superintendent.

It is next urged that the damages allowed were excessive and that the court improperly admitted evidence which

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tended to produce that result. At the time of the overflow there were two acres of cabbages, some small and some large enough to stop working them, half an acre of sweet corn, an acre of potatoes, and also tomatoes and cucumbers, and three acres were prepared for setting with cabbage plants, and the plants were on hand ready for setting. There was evidence of the rental value for the rest of the season of the land not planted, and of the value of the growing crop at the time of its destruction. It is insisted that as to the value of the crop destroyed, the evidence should have been strictly confined to cash market values, and that this was not done. We are not aware that there is any market for cabbages not half grown or other vegetables recently planted, and there was no evidence that such property had any market value. No witness stated that they were the subject of bargain and sale, or that there was any market which fixed the standard of their value. The value to be ascertained was the value of the crop as it was when destroyed, with the right to the owner to mature and harvest or gather it at the proper time. That there was no market standard of such value is clear from the evidence. That value was a matter of estimate or conclusion of the mind to be arrived at from all the facts which would affect it. Such estimate might properly be affected by the quality of the land in which the crop was growing, and so we see no objection to allowing the jury to know, as was done, that this land was very fertile and productive, and that it had produced for a series of years, cabbages, which were larger and brought better prices than the average. The crop would be worth more and a purchaser would pay more for it with the right to mature and gather it, if set and growing in that soil than if planted in a sterile soil where it would not develop and mature. The evidence complained of is mainly of this class, and we see no error in its admission. Perhaps some witnesses estimated the damages upon an improper basis, but if so, the court gave to the jury in an instruction the proper basis, and carefully instructed them that if any witness for plaintiff had given any other basis,

they should disregard it and the estimates and testimony founded thereon, and exclude the same from their consideration of the case. The basis on which witnesses made estimates had been fully ascertained and laid before the jury by cross-examination, and we are satisfied that they fully understood what should be considered by them as legitimate evidence of damage.

As is usually the case the opinions of witnesses as to value differed widely, but those of plaintiff's witnesses sustain the verdict, and we find no sufficient reason to say that the damages were excessive.

Lastly, it is claimed that the suit was begun before any damage accrued to the plaintiff, but the claim is not justified by the evidence.

The judgment will be affirmed.

Staver & Abbott Manufacturing Co. v. Coe.

1. *Witnesses—Separation of.*—The matter of separating the witnesses and excluding them from the court room until called to the witness stand, rests entirely within the discretion of the trial court, and the Appellate Court will not inquire as to whether the discretion was judicially exercised.

2. *Trials—By the Court—Conduct of, etc.*—It is entirely proper for the trial court, in ruling upon objections to evidence, to give his reasons for his holding, being always guarded against saying anything in the presence of the jury prejudicial to either litigant.

3. *Vendor and Vendee—Possession of Goods by Fraud—Execution Debtor.*—Where a merchant who is insolvent obtains possession of goods under a pretense of purchase, by means of fraud and fraudulent representations as to his financial condition, and with no intention to pay for them, title does not pass between them, and the vendor may recover possession of the goods in replevin, if they have not passed into the hands of a *bona fide* purchaser. Such title does not extend to an execution debtor; he does not stand in the sense of an innocent purchaser, but is a mere lienor who takes title subject to all the infirmities existing between the vendor and the fraudulent vendee.

4. *Vendor and Vendee—Fraud—Recovery of Goods—Intention.*—To sustain a recovery of the goods by the vendor, it must appear that the vendee at the time of going through the forms of a purchase, entertained

Staver & Abbott Mfg. Co. v. Coe.

a positive intention not to pay for them. It is not a fraud for a purchaser to buy on credit when he is insolvent. He may even conceal the condition of his liabilities, if he buys with an honest intention, and if he does so with a belief that his affairs will so improve as to enable him to get through his embarrassment, the purchase will stand.

5. *Fraud—Misrepresentations Knowingly Made.*—Misrepresentations knowingly made are sufficient to warrant an inference of fraudulent intent, but to hold that the intention of the party making the misrepresentation is immaterial would be against authority and principle.

6. *False Representations—Commercial Agencies.*—The false representation must be shown to have been made to the vendor or to a commercial agency, whose business it is to ascertain the financial condition of dealers and report to its customers. The business of commercial agencies is well understood in the commercial world, and a false and fraudulent statement made by a retail dealer to one of them upon which a vendor is induced to extend credit, would be followed by all the consequences of a false statement made directly to the vendor.

Memorandum.—Action of replevin. Appeal from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE FACTS.

This replevin was brought by appellant against appellee, sheriff of Livingston County, to recover the possession of twenty-one buggies or spring vehicles seized by him under five executions against Joseph J. Benway and Henry Kuntz, partners, doing business as Benway & Kuntz, at Strawn, Livingston County, Illinois.

The declaration recited that the plaintiff was a corporation and owned the buggies, and that the defendant unlawfully took and detained them from it. The defendant pleaded property in himself, property in the execution debtors, Benway & Kuntz, *nul tiel* corporation, and that he took and detained the buggies as sheriff under said executions. Upon these pleas the usual issues were joined and the case was tried before a jury resulting in a verdict for the defendant as follows:

“We, the jury, find: 1. That the plaintiff herein was a corporation at the time of the beginning of this suit. 2. That the property in controversy in the suit was the prop-

erty of Benway & Kuntz, at the time of the levy made upon it by the said sheriff, under certain executions then held by him. 3. That the defendant is not guilty." The plaintiffs appealed.

APPELLANT'S BRIEF, C. C. STRAWN AND A. C. NORTON,
ATTORNEYS.

To bring a party within the rule, it is not required that the party shall have the particular person deceived, in mind at the time of the making of the fraudulent representations. If he has everybody in mind to whom knowledge of the representations may come, that includes the particular person to whom the representations do in fact come. In such cases the person defrauded is as much within the scope of the fraudulent party's intent, as if the representations were made to him direct. *Wells v. Cook*, 88 Am. Dec. 442; *Watson v. Crandall*, 7 Mo. App. 233, 78 Mo. 583; *Baker v. Crandall*, 78 Id. 584; *Commonwealth v. Call*, 21 Pick. 515; *Commonwealth v. Harley*, 7 Met. 462; *Goodwin v. Goldsmith*, 49 N. Y. Super. Ct. 101; *Genesee Co. Savings Bk. v. Michigan Barge Co.*, 52 Mich. 164; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 481; *Macullar v. McKinley*, 49 N. Y. Super. Ct. 5.

The doctrine is the same where the defendant makes false representations with the intention of deceiving a class to which the plaintiff belongs; though the representations are not made to the plaintiff personally, yet he has his action. *Peck v. Gurnsey*, L. R., 6 H. L. 377, 396, 412; *Bedford v. Bagshaw*, 29 L. J. Ex. 65.

APPELLEE'S BRIEF, R. S. MCILDUFF AND GEO. W. PATTON.
ATTORNEYS.

Undisclosed insolvency on the part of the vendee, is not such evidence of fraud as entitles the vendor to rescind the sale and maintain an action of replevin to recover goods sold. The mere suppression of facts as to his financial standing by a purchaser of goods is not fraudulent, unless his intention is to obtain possession of the goods and not to pay for them. *Reticker v. Katzenstein*, 26 Ill. App. 33; *Morris & Lewis v.*

Reticker, 27 Ill. App. 601; Patton v. Campbell, 70 Ill. 74; People ex rel. v. Healy, 128 Ill. 17; Kitson v. Farwell, 132 Ill. 337.

OPINION OF THE COURT, HARKER, P. J.

Joseph J. Benway and Henry Kuntz, partners, doing business under the firm name of Benway & Kuntz, at Strawn, Livingston County, Illinois, purchased, on four months' credit, twenty-one buggies from appellant, a corporation engaged in manufacturing such merchandise. A few weeks after the buggies were shipped and delivered, judgments were recovered against Benway & Kuntz by various creditors, aggregating more than \$4,000. On executions issued from the judgments, appellee, as sheriff of Livingston County, levied upon and took possession of the buggies. Soon afterward appellant began this suit in replevin to recover possession of them, claiming that Benway & Kuntz obtained them on credit by such false and fraudulent representations as to their financial condition, that title to the property did not pass from it.

There was a trial in the Circuit Court by a jury, which found appellee not guilty of wrongfully taking the property and that the same at the time of the levy of the executions, was the property of Benway & Kuntz. A motion for a new trial was overruled, the usual judgment entered, and this appeal taken.

As grounds for reversal of the judgment below, appellant assigns, and urges vigorously, a multitude of errors committed by the trial court. The first alleged error was the refusal of the court to allow appellant's motion to separate the witnesses and exclude them from the court room until called to the witness stand. This was a matter resting entirely within the discretion of the court. We will not inquire whether that discretion was judiciously exercised. *Errissman v. Errissman*, 25 Ill. 136.

It is urged that the court erred in commenting upon evidence in the hearing of the jury, and that appellant was greatly prejudiced thereby. We have carefully examined

into the record in that regard, and find the comments complained of, to consist solely of what was said by the court in passing upon objections to evidence. We do not agree with counsel in the proposition that in jury trials the court should be content with simply ruling upon the question raised to the evidence—should stop with sustaining or overruling the objection. We think it entirely proper for the trial court to give reasons for his holding, being always guarded, of course, against saying anything in the presence of the jury prejudicial to either litigant. We are unable to see anything in the remarks of the court calculated to prejudice the rights of appellant in the eyes of the jury.

It does not appear from the evidence that Benway & Kuntz made any representations directly to appellant as to their financial condition at the time the buggies were ordered, but the evidence as to that branch of the case consisted of a report made by a local representative to the Bradstreet Mercantile Agency, dated December 4, 1890, a revision of the same dated November, 1891, a report from the Implement Credit Co., a report from R. G. Dun & Co., with an appended statement of Benway & Kuntz, dated December 10, 1890, and a statement made by Benway & Kuntz, February 11, 1892, to Hibbard, Spencer, Bartlett & Co., wholesale dealers in Chicago.

A few days after the order was placed, February 15, 1892, Charles F. Shuey, the credit man of appellant, was given the order with instructions to investigate the financial standing of Benway & Kuntz. Receiving the reports and statements above mentioned, he decided that the firm was solvent and the order was filled, the credit to run four months from the 1st of April, 1892. The goods were levied upon about two months after that date.

We regard the law in this class of cases as well settled. It may be stated briefly as follows: Where a merchant, who is insolvent, obtains possession of goods under a pretense of purchase by means of false and fraudulent representations as to his financial condition, and with no intention to pay for them, title does not pass between them, and the

vendor may recover possession of the goods in replevin, if they have not passed into the hands of a *bona fide* purchaser. Title does not extend to an execution debtor. He does not stand in the sense of an innocent purchaser, but is a mere lienor, who takes title subject to all the infirmities existing between the vendor and the fraudulent vendee.

To sustain a recovery of the goods by the vendor, it must appear that the vendee, at the time of going through the forms of a purchase, entertained a positive intention not to pay for them. It is not fraud for a purchaser to buy on a credit when he is insolvent. He may even conceal the condition of his liabilities, if he buys with an honest intention to pay, and if he does so with a belief that his affairs will so improve as to enable him to get through his embarrassment, the purchase will stand. *Henshaw v. Bryant*, 4 Scam. 97; *Blow v. Gage*, 44 Ill. 208; *Hiner v. Richter*, 51 Ill. 299; *Schwabacker v. Riddle*, 99 Ill. 343; *Kitson v. Farwell*, 132 Ill. 337; *Morrill v. Corbin*, 13 Brad. 86; *Catlin v. Warren*, 16 Brad. 423; *Swaim v. Humphreys*, 15 Brad. 451; *Flower v. Farwell*, 18 Brad. 254; *Wachsmuth v. Martini*, 45 Ill. App. 244.

In *Wachsmuth v. Martini*, this court held that misrepresentations, knowingly made, are sufficient to warrant an inference of fraudulent intent; but to hold that the intention of the party making the misrepresentation is immaterial, would be against authority and principle.

The false representations must be shown to have been made to the vendor or to a commercial agency, whose business it is to ascertain the financial condition of dealers, and report to its customers. The business of commercial agencies is well understood in the commercial world, and any false and fraudulent statement made by a retail dealer to one of them upon which a vendor is induced to extend credit, would be followed by all the consequences of a false statement made directly to the vendor. It would not be sufficient, however, to show that the false statement upon which the vendor relied, had been made to another from whom credit was sought. While appellant could rely upon

statements made to the Bradstreet Mercantile Agency, and R. G. Dun & Co., if properly verified, it could not legally do so on the statement made to Hibbard, Spencer, Bartlett & Co. It does not appear that Benway & Kuntz, at the time of making the last named statement, did so with the intent that it should be acted upon by any person other than the firm to whom it was addressed. Benjamin on Sales, 563; Wells v. Cook, 16 O. St. 67; Eaton v. Avery, 83 N. Y. 34; McCracken v. West, 17 O. 25.

We do not think the proofs made by appellant were sufficient to warrant a recovery. Much produced by it and heard by the jury was improperly received. It would render this opinion too lengthy to discuss in detail the various contentions as to the rulings of the court on questions of evidence. Suffice it to say, that the rulings of the court were more liberal toward appellant than is allowable under strict rules of evidence, and that it was denied no proofs that were legitimate that could have altered the result of the trial.

We do not think from the evidence, that Benway & Kuntz, at the time the buggies were ordered, had conceived the idea of obtaining possession of them and not paying for them. We do not think that when the statements to the two commercial agencies were made, they entertained an intention to defraud persons that might be induced to extend credit to them.

There are some errors in the instructions, but we feel so well satisfied that the verdict of the jury was right, under the evidence, and that no other conclusion should have been reached, that we shall not reverse the judgment for errors there found. Judgment affirmed.

Hogan et al. v. Donohue.

1. *Measure of Damages—Market Price of a Commodity.*—Where the market price of a commodity is in issue, and no market price at the place of delivery has been established by the usual mode of trade, it is competent to hear proof of prices in adjacent and controlling markets.

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2. *Measure of Damages—Board of Trade Prices.*—The price of the commodity on the Chicago Board of Trade, does not always represent its true market value. Often prices there are exaggerated as well as depressed by the most dishonest and unfair means.

3. *Measure of Damages—Market Price of Grain.*—In an action between the vendor and vendee for the price of corn, it was contended upon one hand that the market price, at the place of delivery, could be controlled by the Board of Trade at Chicago, less the cost of transportation, etc. On the other hand, the contrary was contended; an offer was made to prove that the grain was cornered on the Board of Trade on that day, and that before the prices there prevailing could be obtained, it must be inspected in an elevator in Chicago, a warehouse receipt issued and duly registered. It was held that the proof offered was competent and that the court erred in refusing it.

Memorandum.—Action of assumpsit. Goods sold and delivered. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

MAYO & WIDMER, attorneys for appellants.

BREWER & STRAWN, attorneys for appellee.

OPINION BY THE COURT, HARKER, P. J.

Appellants, dealers and shippers of grain, owned an elevator and warehouse at Seneca, Ill. At various times during the two years following the 27th of September, 1888, appellee delivered to them for storage 4,170 bushels of corn and 1,036 bushels of oats under the agreement that whenever the market price at Seneca suited him he might sell to them. Advances were made from time to time, on the grain stored, which were subsequently embodied in two notes, one for \$1,655.50, of date December 26, 1889, and the other for \$430, of date June 12, 1890, and a stated book account of \$217.48. On the 10th of September, 1891, appellee sent word to appellants to close out the corn at 62 cents, whenever the market price reached that figure. On the 27th of November of that

year, he applied to appellants for a settlement, and insisted upon being allowed 70 cents per bushel for the corn because cash corn was, on that day, 75 cents on the Chicago Board of Trade. Appellants refused to allow him more than 50 cents per bushel, claiming that was the price in Seneca, and that the price on the Board of Trade was a "cornered price." The parties were unable to come to an understanding and on the 17th of the following December, appellants took judgment on the notes for \$2,207.50, upon the power of attorney to confess, contained therein. The judgment was opened, and upon a trial had in the Circuit Court, appellee, on his plea of set-off, recovered judgment for \$215.40.

The controverted question in the case was over the market price of corn at Seneca, on the 27th day of November, 1891. It was shown by the testimony of appellants, Martin Hogan, Daniel P. Cahill, John Burke, and Philander Graves, a competitor of appellants in the grain business at Seneca, that the market price of old corn in that place on that day was 50 cents per bushel. It was shown by other witnesses that the market price in Ottawa, twelve miles further west, was from 46 to 50 cents, and on board the cars at Chicago, from 44 to 46½ cents per bushel. It was also shown that on the Chicago Board of Trade it, on that day, opened at 80 cents, went to 75 cents, back to 80 cents, and then down to 73 cents per bushel.

Seneca is a small place, and there were at the time but two firms there dealing in grain. Under the circumstances it was competent to hear proof of the market value of corn in markets within the vicinity of Seneca; not for the purpose of fixing the price between appellant and appellee, but for the purpose of showing the market price at Seneca. It was claimed by appellee that the dealers had arbitrarily fixed the price there at fifty cents. Where the market price of a commodity is in issue, and no market price at the place of delivery has been established by the usual modes of trade, it is competent to hear proofs of the price in adjacent and controlling markets. *Grand Tower Mining, Manufacturing and Transportation Co. v. Phillips*, 23 Wall. 471; *Richmond v. Bronson*, 5 Denio, 55; *Cahen v. Platt*, 69 N. Y. 348.

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On the day mentioned, there was a difference between the price of corn on board the cars at Chicago and on the Board of Trade of about thirty cents per bushel. Nothing but an unhealthy condition of affairs on the Board of Trade could have produced so great a disparity. Appellants offered to prove that corn was cornered on the Board of Trade on that day, and that before the price there prevailing could be obtained it must be inspected in the elevators in Chicago, a warehouse receipt issued and duly registered, but the court refused such proof. In this there was error. It is a notorious fact that the price of a commodity on the Chicago Board of Trade does not always represent its true market value. Often prices there are exaggerated as well as depressed by the most dishonest and unfair means.

From all the proofs in the record we are of the opinion that the market price of corn in Seneca, on the 27th of November, 1891, was fifty cents per bushel. The jury allowed between sixty and seventy cents per bushel.

We see no serious objection to the instructions. In view of the testimony as to the price of corn prevailing on the Board of Trade and costs of transportation, the fourth instruction given for appellee was proper.

For the error of the court in denying appellants the right to make the proof offered, and because the jury allowed appellee too much for his corn, the judgment must be reversed and the cause remanded for another trial.

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49	435
56	287
49	435
157s	576

1. *Judgment by Confession—Authority to Confess.*—It is a rule firmly established, that the authority to confess judgment, without process, must be clearly given and strictly pursued.

2. *Confession of Judgment—Entered Nunc Pro Tunc.*—A clerk of a court in this State is not authorized to enter a judgment by confession in vacation as of some previous term; he can only enter judgment in vacation as such and can not enter it as of some term, or *nunc pro tunc*.

3. *Judgment by Confession—As of a Term.*—A judgment by confes-

sion "as of a term" can only be entered in term time, the expression "as of any term," when applied to entering a judgment by confession, can only mean at any term.

4. *Judgment by Confession—Warrant of Authority—Vacation and Term Time.*—A warrant of attorney authorizing any attorney in any court of record within the United States, to appear and confess judgment upon a promissory note against the maker, as of any term, for the amount of the note, costs of suit and attorney's commission, etc., does not authorize the confession of the judgment in vacation, and a judgment entered in vacation under it is void.

5. *Motion—Right to Make—Waiver.*—Where an executor made a motion to vacate a judgment, entered against his testator in vacation, and did not file his letters testamentary until the term subsequent to entering the motion, and it being objected that he had no right to make the motion, *it was held* that the objection was waived by contesting the motion upon its merits.

6. *Appearance—Special Entry of.*—Where the object of entering an appearance is to question the jurisdiction of the court, it is not necessary that the person entering such appearance should submit himself to the jurisdiction, surrender his right in that respect, and confer jurisdiction where none existed.

7. *Judgments by Confession, When Void.*—Where a judgment has been entered by confession upon a *cognovit* and is void, the court should, upon motion, vacate it and leave the party plaintiff to pursue the ordinary remedy by an action at law.

Memorandum.—Order overruling a motion to vacate a judgment entered by confession. Appeal from the Circuit Court of Putnam County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, OTIS & GRAVES, ATTORNEYS.

Our courts make a radical difference between the two classes of judgments; those entered in term time having the presumptions of law as to jurisdiction of the court and other matters in their favor, while those entered in vacation have no presumption of law in their favor, but the record itself must conclusively show that all the vital requirements of the law have been complied with. Therefore it is that in vacation judgments, all the papers filed therefor become a part of the record, which they are not in judgments

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entered in term time. *Waterman v. Caton*, 55 Ill. 94; *Stein v. Good*, 115 Ill. 93.

Story on Agency, 5th Ed., Sec. 68, says, after giving numerous illustrations of this restriction of power: "Indeed, formal instruments of this sort are ordinarily subjected to a *strict interpretation*, and the authority is never extended beyond that, which is given in terms, or which is necessary or proper for carrying the authority so given into full effect." In *Chase v. Dana*, 44 Ill. 263, the court says: "As a general rule, well recognized and firmly established, an attorney in fact is held to a strict compliance with the authority conferred. When he acts, it must, to be sustained, be within the scope of his authority. It must be for the purposes prescribed, and in the mode required. A departure from the authority conferred, or for purposes not authorized, will not be sustained, because there is a want of power." In *Tucker v. Gill*, 61 Ill. 236, the power of attorney was for confession of judgment on a note for \$26,000, with interest, etc., and *cognovit*, confessed judgment for \$50,000 damages, and clerk entered judgment in vacation for \$26,000, and the court held the judgment void, and that the clerk must enter judgment for amount confessed in *cognovit* or none at all; that he could not enter a judgment for a less amount. And the court cites *Chase v. Dana*, *ante*, and says that the warrant of attorney must be strictly pursued, and also cites 2 Kent's Com. 621, "The special authority must be strictly pursued."

In *Frye v. Jones*, 78 Ill. 632, the court says: "The authority to confess a judgment without process, must be clear and explicit, and must be strictly pursued," and in that case there was far more room for sustaining the judgment held void than in our case.

In *Keith v. Kellogg*, 97 Ill. 151, the court says: "The doctrine is well settled and has often been recognized by this court, that the power to confess a judgment must be clearly given and strictly pursued or the judgment will not be sustained."

In *Gardner v. Bunn*, 132 Ill. 408, the court uses similar

language. *Gilbert v. How*, 45 Minn. 121, is to the same effect, and in *Grover & Baker Sewing Machine Company v. Radcliffe*, 137 U. S. 287, Chief Justice Fuller, in his opinion, says: "What Benge authorized was confession by any attorney of any court of record in State of New York or any other State, and he had a right to insist upon the letter of the authority conferred." In that case judgment was entered by confession by a prothonotary under a local statute of Pennsylvania, and the judgment sued on in Maryland and appealed to the United States Supreme Court, which declared the original judgment by confession was void, for the reason as stated above by opinion of Chief Justice Fuller.

It will be conceded that the authority to confess a judgment must be found in the warrant of attorney or the judgment is void.

The court will not supply words that are absent, nor will it give any but the natural and legitimate construction to words that are present.

The authority here is explicitly to enter judgment "as of any term," and by no juggling with words or sophistry of reasoning can any intention to authorize the confession of judgment in vacation be twisted out of or injected into that expression "as of any term." The language used as to attorneys, courts of record, and as of any term, is the language of the common law, and wherever courts of record are known at common law, there is also known the division and distinction between the time when the court is in session and when it is not, universally and invariably expressed by the words, "term time" and "vacation." Terms of court are prescribed by law and are the times when the vital spark is present that gives them life and power, and sets the machinery of the law in motion for the administration of justice; when the judge is on the bench clothed with his judicial powers for the trial of causes, the entering of orders, the rendering of judgments and the general transaction of all business pertaining to the hearing and adjudication of the rights of the parties in court.

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APPELLEE'S BRIEF, FRED T. BEERS, ATTORNEY.

The warrant authorizes "any attorney of any court of record" to confess, etc. The omission of words restricting the appearance of such an attorney to any particular place, for the purpose of such confession makes it sufficiently appear from the terms of the warrant, that the proceedings could be had in any court of record. This brings this case within the rule laid down in *Keith v. Kellogg*, 97 Ill. 147. There can be no possible connection between the language above quoted as to where the judgment should be confessed and the words "as of any term" except to show that the judgment when so confessed should have the same force and character as of a judgment entered in any term. See *Harris v. Peck*, 2 D. & L. 106; 8 Jur. 929; 13 L. J., Q. B. 295. *Jacob's Fischer's Dig.*, Col. 13302, Vol. 8.

Warrant to confess judgment should not be construed so as to defeat the intent. *Holmes v. Bemis*, 124 Ill. 456; *Holmes v. Parker*, 125 Ill. 479; *Keith v. Kellogg*, 97 Ill. 151; *Hoffman v. Danner*, 2 H. 29 (Pa.); *Conkling v. Ridgely*, 112 Ill. 43.

As to the meaning of "as of any" as herein used, where a warrant of attorney, dated and delivered in a period of vacation, for a debt then due, authorizing judgment in "term or vacation," the judgment was entered at once (in vacation) and was entered "as of the June term" (which was term preceding the vacation in which it was actually entered). The court refused to set it aside. *King v. Shaw* (N. Y.), 3 Johns. 142.

Where the warrant read that judgment could be taken "as of Easter term last past, Trinity term now present, or any other subsequent term," the judgment finally was taken in vacation and with leave "was entered as of the preceding term." And notwithstanding the rule of court was that all judgments should be entered the day taken, the court held the action to be a substantial compliance with both the warrant and the rule, and affirmed the court below, refusing to set the judgment aside. *Alcock v. Sutcliffe*, 4 D. & L. 612; *Jarvis v. South*, 13 M. & W. 152.

And it is discretionary with the court whether or not such judgment should be vacated, and to determine if substantial injustice has been done to the defendant where his warrant waived all errors and appeal, and the burden of proof rests upon defendant. Roenigk's Appeal (Pa.), 3 Alt. Rep. 99; McCabe v. Sumner, 40 Wis. 386; English's Appeal, 119 Pa. St. 533.

OPINION OF THE COURT, CARTWRIGHT, J.

A judgment by confession was entered on August 3, 1892, by the clerk of the Circuit Court of Putman County, in vacation, for \$15,600, in favor of appellee, against Philip R. Bohlen. Afterward, at the next succeeding term of said court, on October 24, 1892, appellant, as executor of the last will and testament of said Philip R. Bohlen, then deceased, entered a special appearance for the sole purpose of questioning the jurisdiction to enter said judgment, and moved the court to set aside and vacate it as absolutely void, because there was no jurisdiction of the person of the defendant at the time it was entered. Said executor on the same day produced and filed a duly authenticated copy of the last will and testament of said Philip R. Bohlen, deceased, and of the probate thereof, in the Probate Court of Shelby County, Tennessee, and the appointment of said executor. From the record so produced, it appeared that Philip R. Bohlen died at his home in Shelby County, Tennessee, August 27, 1892, being then a citizen and resident of Memphis, in said county, leaving a last will and testament of which appellant was appointed executor. On the next day after the filing of the above motion, appellee filed a cross-motion to strike appellant's motion from the files, together with an affidavit in support thereof, stating that notice had not been given of the intended filing of said motion before it was filed. The court thereupon continued the proceeding for the purpose of giving notice of the motion to vacate the judgment. Notice was given November 3, 1892, that the motion to vacate would be called up for hearing on the first day of the March

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term, 1893, at which time both parties appeared, and the court overruled both the motion to vacate the judgment, and the cross-motion to strike from the files the original motion. Both parties have assigned errors.

The reasons for claiming that the judgment was void for want of jurisdiction, were apparent on the face of the record, and were, that the warrant of attorney filed, did not authorize the attorney appearing for the defendant to appear and confess judgment in vacation, and that there was not sufficient proof of the execution of the warrant of attorney. The note and warrant of attorney were in one instrument, as follows :

“\$10,000.

JANUARY 17th, 1884.

Five years after date, I promise to pay to the order of Jake Hill, ten thousand dollars, without defalcation, value received, with interest from date, and I do hereby empower any attorney of any court of record within the United States, or elsewhere, to appear for me and confess judgment against me as of any term for above sum, with costs of suit, and attorney's commission of five per cent and release of all errors, hereby waiving inquisition, and agreeing to the condemnation of any property that may be levied upon by any execution which may issue forthwith on failure to comply with the conditions hereof; also hereby waiving the benefit of the exemption laws, or any act of assembly relative to executions now in force or hereafter to be passed.

Witness my hand and seal.

P. R. BOHLEN. [SEAL.]

Attest: GEORGE A. DOUGAN.”

The instrument bore the following indorsements :

“For value received, I hereby sell, assign and transfer the within note and all moneys secured thereby, to George I. Whitney, of Pittsburg, Penna.

JAKE HILL.

Filed Apr. 1, 1890. JOHN B. CLOUGH, Clerk.

Filed August 3, 1892. JEFF DURLEY, Clerk.”

It is a rule firmly established that the authority to confess a judgment without process must be clearly given, and

strictly pursued. Chase v. Dana, 44 Ill. 262; Frye v. Jones, 78 Ill. 627; Keith v. Kellogg, 97 Ill. 147; Gardner v. Bunn, 132 Ill. 403. The power in this warrant was to appear and confess judgment as of any term. The judgment entered was a vacation judgment merely. The attorney did not appear or confess judgment as of any term, but as in vacation. The argument for appellee is that the intention was to authorize a judgment in vacation, and have the holder of the note select some term, one or more terms or years prior to the entry, and have the judgment entered *nunc pro tunc* as of the term so selected, so that it would become a judgment in term. It is said that the object was to enable the holder of the note to cut off defenses and remedies of the maker in that way, or place it beyond the power of the maker to reach the judgment on account of its being entered as of a term long before. If the power was intended as claimed to authorize a *nunc pro tunc* judgment in vacation as of some term, it could not be so exercised in this State. When attempted to be exercised here it could only be done by virtue of some procedure authorized by law in this State, and such a proceeding, as is suggested, could not be had here. A clerk of court is not authorized to so enter a judgment. He can only enter judgments in vacation as such, and can not enter them as of some term or *nunc pro tunc*.

As there is no power to so enter a judgment, there can be no power to so confess one. A judgment by confession as of a term can only be entered in term. "As of any term," when applied to entering judgment by confession, can only mean at any term. In our opinion the warrant only authorized a confession in term, as that was the only time when it could be done as of a term. The judgment was therefore entered without authority, and was void.

It is objected that appellant had no right to make the motion because he produced and filed his letters testamentary at the term subsequent to the entering of his motion. The record shows, as before stated, that proof of the will, the probate and his appointment was produced and filed on the day the motion was entered. If there was anything

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in the point, it was not presented to the Circuit Court, not being assigned as a reason for striking the motion from the files, or otherwise raised, and was waived by contesting the motion on the merits.

It is further urged that appellant could not raise any question concerning the judgment without entering a full appearance in the suit, and submitting himself to the jurisdiction of the court, so that a trial might be had upon the merits. We do not understand that where the object of entering an appearance is to question the jurisdiction of the court, it is necessary that the defendant should submit himself to the jurisdiction, surrender his right in that respect, and confer jurisdiction where none had existed. The judgment being void the court should vacate it, and leave appellee to pursue the ordinary remedy by action. *Walker v. Ensign*, 1 Brad. 113; *Stein v. Good*, 115 Ill. 93.

Being of the opinion that the warrant of attorney did not authorize the entry of the judgment, it will not be necessary to consider the questions arising upon the proof of its execution.

The cross-errors are assigned on the refusal of the court to strike appellant's motion from the files. The only reason given in support of the motion was want of notice. There is no requirement that notice shall be given before the filing of the motion. Appellee appeared and had notice of the filing of the motion at the time when it was filed. Notice was given several months before the term when it was heard, at which term appellee again appeared and contested it. No further or other notice was necessary.

The order of the court overruling the motion to vacate the judgment will be reversed, and the cause remanded.

Illinois Central Railroad Company v. Simmons.

1. *Common Carriers—Neglect of Duty—Damages.*—The owner of a lot of cattle, in good condition, desiring to ship them over the plaintiff's road to Chicago in time for the next day's market, delivered them at

the station on its road and they were loaded into cars furnished for that purpose in ample time, if shipped in the usual course of its business, to reach Chicago and be put upon the next day's (Friday's) market. The train in which the car containing the cattle was to be put, reached the station several hours late, and by some neglect, not explained, failed to take the car. Some hours later another train passed without taking it. It then being too late to get the cattle upon the Friday's market, they were unloaded and taken home. The next day the market was lower; a few days later, when the cattle were shipped to Chicago the market was still lower. In an action brought to recover damages, the jury awarded the plaintiff \$134. *It was held*, not to be excessive, considering the fall of the market, the state of the weather, and the evidence tending to show that in driving the cattle back and forth and keeping them until they were finally shipped, they shrunk from sixty to seventy pounds, and were also fed ten or eleven bushels of corn a day, worth thirty-five cents a bushel.

Memorandum.—Action of assumpsit. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE FACTS.

This suit was brought in the Circuit Court of Kankakee County, by Stephen Simmons against the Illinois Central Railroad Company, alleging that on the 4th day of January, 1893, he loaded twenty-one head of cattle on a freight car of appellant about 11 o'clock P. M., to be shipped from Ashkum, Illinois, to Chicago, Illinois, and that the cattle remained in the car until 7 o'clock the next morning, when he unloaded them, took them back to his home, and kept them at home until the 11th of January, when he re-shipped them, and it is claimed that he lost about \$200. Upon the trial of the case the jury gave a verdict for \$134, upon which judgment was entered, and the defendant appealed.

APPELLANT'S BRIEF, WHEELER & HUNTER, ATTORNEYS.

We understand the rule of law to be that a common carrier is bound to carry goods within a reasonable time after they have been received. *I. C. R. R. Co. v. McClellan*, 54 Ill. 58; *I. C. R. R. Co. v. Cobb*, 64 Ill. 128; *T. W. & W. Ry.*

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Co. v. Lockhart, 71 Ill. 627; W., St. L. & P. Ry. Co. v. Land, 11 Brad. 491.

APPELLEE'S BRIEF, H. L. RICHARDSON AND J. ATTORNEYS.

It was the negligence of appellant in not having the train at 11 o'clock, thus forcing the cattle to remain in the yard, that caused the damage. Time tables are not to be treated as mere waste paper. They are offers of contracts upon acceptance, as in this case, for the car and loading for and with reference to 11 o'clock. *Indianapolis R. Co. v. Birney*, 71 Ill. 391; *Denton R. Co.*, 5 E. & B. 860.

In this case there was a receipt of cattle by the carrier, in the general course of business, and simply a failure to ship through negligence, after taking without objection. Cattle are received, bound to carry. *Great Western Ry. Co. v. Burns*, 60 Ill. 284.

When the cattle were delivered, it was its duty to ship immediately, or by the first regular train, and to do so at the advertised time. *Illinois Central Ry. Co. v. Smyser*, 38 Ill. 354; *Illinois Central Ry. Co. v. Burns*, 58 Ill. 487.

OPINION OF THE COURT, LACEY, J.

This was an action on the case by appellee against appellant to recover damages for failure to ship with reasonable time after they were received, twenty-one head of cattle, of appellee, from the village of Ashkum, Ill., to be sold at the stock-yards on the market. The cause was tried, and resulted in a judgment of \$134 for appellee, from which judgment appeal is taken. The facts of the case, as they are tended to show, are, that appellee, the owner of the head of cattle in good condition, desired to ship from Ashkum, Ill., to Chicago, Ill., for sale on the market, and appellant's agent on January 4th, he wanted to ship the stock the next night, that would be the night of

January—that was Thursday. The cattle were loaded on the car on Thursday the 5th, at 9.30 o'clock A. M., and set in on the appellant's side track at 5 o'clock P. M., ready for shipment. The advertised time of the running of appellant's regular stock train was, that it passed Ashkum for Chicago at 11 o'clock P. M. daily, and reached Chicago, Ill., at 6 or 7 o'clock the next morning, in time for Friday's market. The appellee waited at the depot in Ashkum for the train, intending going in it, with his stock; that the stock-train was behind time, and did not arrive at Ashkum at 11 o'clock P. M., but passed that place at 5 o'clock the next morning, and by some neglect, not explained, failed to take appellee's car load of stock; at 7 o'clock A. M. the appellant's train, called the banana train, came along and was ordered by appellant's station agent to take the car load of stock in question. At first he said he could not do it, could not haul them, but afterward proceeded to make the attempt, but delayed so long that the stock would not arrive in Chicago in time for Friday's market. Appellee asked the station agent, as he was not going to get them in for Friday's market, if he had not better unload them and take them home, and the agent replied that he could do as he pleased; thereupon appellee unloaded his cattle and took them home and kept them until the 11th of January, Wednesday of the next week, when he again re-loaded them on appellant's cars, and shipped them to Chicago, and sold them on the Chicago market. The cattle weighed at that time 870 pounds each, and he recovered \$3.50 per hundred. The evidence tended to show, that on Friday, the 6th of January, cattle of the grade of those of the appellee's brought \$3.75 per hundred pounds, and that of Saturday, the 7th, the earliest time the cattle could have been put on the market if appellee had shipped them on the banana train, the price of like cattle was from fifteen to twenty-five cents less per hundred. The weather was very cold, and the evidence tended to show that in driving the cattle back and forth, and keeping them till the 11th, they shrunk from sixty to seventy pounds each, and on account of shrinkage

would not bring so much on the market; that they sold as butcher's stock; also that he fed them ten or eleven bushels of corn per day, worth thirty-five cents per bushel.

The judgment seems a trifle excessive of what this court might have found, but we can not say that the jury was not authorized in its assessment of damages against appellant.

Counsel for appellant objects to the first instruction given for appellee as erroneous, and particularly because it instructs the jury that appellant was bound to take the stock on the eleven o'clock train. The instruction, however, does not so direct except on the hypothesis that the appellant "should have" done so, *i. e.*, that it was its duty.

The contention of the appellee is that it was the duty of the appellant to take the stock "in a reasonable time after it was loaded for shipment" and that it was not confined to any particular train.

The instruction does not seem obnoxious to that objection. Other instructions supply and fix the time when the appellant "should" take the stock, or the time, under the evidence, it was its duty to take it. It is also objected that other of the appellee's instructions are faulty, in telling the jury that if appellant "agreed to take the stock at any specified time or advertised its trains to go at any particular time, then in law it was bound to take the stock at that particular time." The contention of appellant's counsel is that the law only required a common carrier to carry the goods within a reasonable time. That, as a general proposition, is correct. But on the trial appellant seemed to take the same view of the law in reference to an agreement to carry at a time agreed upon, as did appellee, for he so limited his instructions. His first instruction told the jury that, though there was an agreement to carry on the night of the 5th and the appellee failed to let his cattle go on the 7th and no damages would have accrued to him in such case, then there would be no recovery.

This seems sound, though the instruction admits, inferentially, the binding force of the agreement in the event the

cattle could not have been sold for as good a price on the 6th as 5th of January.

The second of the appellant's instructions explicitly admits the binding force of the agreement, if one had been proven, to carry the stock on the 5th, and the appellant's liability for damages, and tells the jury that the measure of damages, if appellee had an opportunity to send the stock the next morning, would be the difference between what he could have got on the 5th and 6th, and if no difference, no damages. The 5th instruction for appellant states the rule to be that the shipment need only be made in a reasonable time after the stock was received, but excepts the case where there was "no special contract between the parties in relation to the time of starting or of its arrival at Chicago."

The appellant's instructions admit the law as fully on the binding force of a contract as those of the appellee; in such case, even if the jury were misdirected by the court, it was done as much at the instance of appellant as of appellee, and it is therefore estopped, as has been many times held by both this and the Supreme Court, from insisting on such alleged error in the Appellate Court. As to the advertisement of the time of the regular stock train, it will be observed it is only evidence of a contract upon stock being delivered for shipment on the faith of such advertisement. *Indianapolis R. Co. v. Birney*, 71 Ill. 391. There can be no reasonable claim but that appellant failed to ship the appellee's cattle, contrary to its legal duty on any theory of the case. It failed to either ship at 11 o'clock or at 5 o'clock, A. M., when the regular stock train, though several hours late, passed Ashkum. To have shipped the stock at 5 o'clock would have afforded an opportunity to appellee to get his cattle in Chicago in time for markets of the 6th, or Friday. But the train passed, and no explanation is given for its failure to take the stock. The next train was due at 7 o'clock, and the conductor said he could not draw the stock car, and besides, it was too late to get it to its destination for the Friday's market, thus putting appellee in Chicago the very last day

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of the week. The stock in cold weather had been loaded nearly twenty-four hours and must have been suffering from exposure. The station agent knew the facts in connection with appellee's situation, and his purposes and aims as respected the cattle, and to let the stock train pass without taking the cattle, was the highest neglect. The jury could not reasonably have found any other way than to find the appellant guilty of negligence. It is doubtful whether the verdict, everything considered, is excessive or exceeds appellee's real loss. As to the point made that it was the appellee's duty to send the stock on the 7 o'clock train to save loss and reduce damages, and not having done so, he can at least only recover such damages as he would have sustained had he followed this course, we can say, that in our opinion, the jury settled that issue. In the first place, whether the train could have taken the stock, is doubtful from the evidence. The conductor so stated, though he appeared to be willing to make the attempt. It was for the jury to say, under the evidence, whether reasonable care to avoid loss on appellee's part required him to send the cattle, or make the attempt on that day. The instructions were full and favorable to appellant on that point. The question was for the jury to decide how a reasonable man, placed in appellee's embarrassing condition, would have acted under the circumstances. It found for the appellee on that point, and we can not say unjustly. Under all the circumstances and evidence in the case, we think substantial justice had been done. Judgment affirmed.

City of Streator v. Hamilton.

1. *Negligence—Defective Sidewalk.*—On the trial of an action against a municipal corporation for damages, sustained by reason of a defective sidewalk, it is error to permit the introduction of evidence on the part of the plaintiff, showing the condition of the walk at other places than that at which the injury occurred.

2. *Negligence—Defective Sidewalk—Burden of Proof.*—In an action for the recovery of damages, sustained by reason of a defective sidewalk, it is necessary to the recovery for the plaintiff to prove that the proximate cause of the accident and consequent injury was the failure of duty on the part of the municipal corporation to keep its sidewalks in a reasonably safe condition.

3. *Negligence—Defective Sidewalk—Subsequent Repairs.*—On the trial of an action for personal injuries, resulting from a defective sidewalk, it is error to permit the admission of evidence showing that repairs were made on the sidewalk after the occurrence of the accident.

4. *Instructions.*—It is error to refuse an instruction which states the law correctly and contains propositions of law which are not embraced in other instructions given to the jury.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of La Salle County: the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

Defendant's seventh and eighth refused instructions:

7. The court instructs the jury as a matter of law, that a city is not required to have its sidewalks so constructed as to secure immunity in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution; and in this case, if the jury believe from the evidence, that the sidewalk was so constructed as to be sufficiently level and smooth for ordinary travel, and so built that it would not, by reason of any latent defects therein, give way, or by reason of patent defects therein at the time of the alleged injury, was not dangerous to walk upon by one who was ordinarily cautious and prudent, and that the sole cause of the accident, if you believe there was one, was due to the accidental omission of the plaintiff to exercise ordinary care while passing along and upon said sidewalk, at the point where the alleged injury took place, then such a condition of the sidewalk would not be a defect for which the city would be liable.

8. You are instructed that municipal corporations, such as the defendant, are only liable for such defects in their sidewalks as are in themselves dangerous, or such that a person exercising reasonable care and caution can not avoid danger in passing over it. If the jury believe from the evidence that the defect in the sidewalk in question was not in itself dangerous to the safety of a person passing over it with reasonable care and caution, and that the alleged injury was the result either of a mere accident without negligence on the part of defendant, or that it resulted from a want of reasonable care and caution on the part of the plaintiff, then the jury should find the defendant not guilty.

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The statement of facts is contained in the opinion of the court.

G. E. GLASS, attorney for appellant.

WALTER REEVES, attorney for appellee.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellee sued appellant for damages sustained by falling while passing over one of its sidewalks, and alleged that her fall was caused by a defect in the sidewalk which rendered appellant liable. There was a trial, which resulted in a verdict and judgment for appellee for \$1,500.

The plaintiff's account of the accident was that she was going toward home with two parcels in her arms, on June 17, 1891, at about 11 o'clock in the forenoon, when the heel of her shoe was caught in the walk in some way which she was not able to explain; that part of the heel of her shoe was torn off, and that when it gave way she fell at full length upon the walk, causing a sprain of the ankle, and resulting in an abortion. The walk in question was shown to be about five feet wide, and made of two-inch plank laid crosswise upon three stringers two inches thick and six inches high. The walk was an old one, and there was considerable travel over it. Plaintiff fixed the place where the heel was caught within a space of about ten feet and near a certain gate. That the accident occurred at that place was not in doubt, and it was shown quite clearly that there was no defect in the walk where it occurred, except that one plank which had a sappy edge on the upper side had decayed in that part from natural causes, and the edge had sloughed off, leaving a crevice on the upper side from one and a half to two inches wide, next to the adjoining plank. This decayed portion did not extend through the plank, which was of the original width at the bottom, but the opening between the planks on the upper side was probably wide enough and deep enough to admit the heel of the shoe.

It was necessary to a recovery by the plaintiff, that she

should prove that the proximate cause of her fall and consequent injury, was a failure of duty on the part of the defendant, in respect to the alleged defect. To show such failure, it was essential that the injury should be caused by a defect of such a nature as rendered the walk not reasonably safe, and that an ordinarily careful and prudent person, having charge of the walk, would have so regarded it and have made repairs. While we shall not express any opinion on the facts, it will be apparent from what has been said, that it was by no means clear that the alleged defect was such as to create a liability, and that the case was such as required that no material errors of law should intervene against the defendant, and especially in the admission of testimony which might have tended to produce a verdict on general principles or for some other neglect.

On the trial the plaintiff was allowed, against the objection of defendant, to introduce evidence of the condition of the walk for a distance of about two blocks. Its condition elsewhere was wholly irrelevant to the inquiry concerning the liability of the defendant for the injury to the plaintiff.

An omission to repair a defect in the walk, could only become a wrong to the plaintiff, when an injury resulted to her from such omission. She suffered no injury from any neglect to repair any defect, unless it was where the heel of the shoe was caught, and the evidence must connect her injury with that neglect as a proximate cause. The evidence objected to, tended merely to prove a neglect of duty to the public at large, not resulting in any injury to the plaintiff.

The only reason advanced by counsel in support of its admission is that it tended to prove notice to the defendant of the alleged defect which caused the injury. We are unable to see how the existence of a hole or broken or loose board in another place would afford information to the defendant that the plank in question was in the condition shown by the evidence. The only effect would be to lead the jury to believe that the city authorities were habitually negligent concerning sidewalks. The evidence should not have been admitted.

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Plaintiff was also permitted to introduce evidence that repairs were made on the sidewalk after this accident, by nailing barrel staves and pieces of cracker boxes over holes at various places. This evidence was improper and should have been excluded. *Hodges v. Percival*, 132 Ill. 53; *Wabash R. R. Co. v. Kime*, 42 Ill. App. 272; *Black on Proof and Pleadings in Accident Cases*, Sec. 30.

It is argued that this evidence was competent to show that there were holes in the sidewalk. If that was the tendency of the proof it would still be improper, for the jury were only concerned with the alleged defect where the accident occurred; but that was not the natural effect of the proof. The jury would understand it only as an admission of the defective condition of the sidewalk.

The seventh and eighth instructions asked by the defendant were refused. They stated the law correctly and contained propositions of law which were not embraced in any instructions given to the jury. They should have been given. The judgment will be reversed and the cause remanded.

Demme & Dierkes Furniture Company v. McCabe.

1. *Contracts—Work, Labor and Services.*—Where a person enters into a contract to complete a piece of work for a stipulated sum and is prevented from fulfilling it by the default of the party for whom the work is to be performed, he is excused from completing the performance and may recover *pro tanto* at the contract price.

2. *Instructions—Erroneous, Not Cured by Proper Ones, Unless, etc.*—An erroneous instruction is not cured by the giving of a proper one for the opposite side, unless the court can see, everything considered, that the jury were not misled, and that the verdict was clearly the proper one.

Memorandum.—Action of assumpsit. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

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WHEELER & HUNTER, attorneys for appellant.

RICHARDSON BROS., attorneys for appellee.

OPINION OF THE COURT, LACEY, J.

This is a case originally commenced before a justice of the peace by one Lowe, a creditor of E. O. McCabe, by garnishee proceeding in favor of McCabe, for use of Lowe against the appellant, and by appeal taken to the Circuit Court; and upon trial in that court appellee was successful and recovered judgment against appellant for the sum of \$76.48, rendered on verdict of a jury.

It appears that appellee, McCabe, contracted with appellant to make some furniture in its shop at Kankakee, at a stipulated price, or rather a certain number of pieces at a certain price per piece, to wit: 150 beds at \$1.50 apiece; 200 beds at twelve cents per piece; 200 toilets at nine cents per piece; 200 other beds at thirty cents per piece; 200 other toilets at fifteen cents per piece, or eighteen cents; 500 beds at four and a half cents a piece, and twenty-four sample beds at no set price. Appellee did not finish the sample beds; he made the foundation for all of them and got them all started. None of the work was completed except four of the sample beds; the 150 beds were nearly completed. Appellee employed men to assist him. The appellee testified that he did not charge appellant by the day, and appellant did not keep the men's time. The claim of the appellee is that he abandoned his contract because appellant failed to furnish material to do the work with as it had agreed.

The appellee testified that the appellant owed him \$70.20, and that they owed him for hired help, or help they told him to hire, \$46.47. The men appellee hired were looking to him for their pay.

The testimony of the appellant was, that it paid him on the contract \$115.15, and that after appellee left, they finished up all the beds at the contract price. The company advanced to appellee as the work progressed. Appellant completed the work that it had contracted to appellee, after

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he abandoned it, at a cost of \$200.45. It paid him for seventy-two hours work at twenty cents per hour, amounting to \$14.40, and paid him \$8.15 for the work he had done by the day, which he accepted for the work he had done on the samples; appellant paid appellee on the contract \$118.15, and paid out for him in finishing the work \$200.45. The work at the contract price would have been worth \$275, and \$14.40 on the sample beds, making \$289.40, if the contract had been finished, including the sample beds, leaving a balance in appellant's favor of \$21.05.

It will be seen that appellee testified to the balance due him in a lump, without showing how he arrived at the amount, or on what basis he calculated it. He also charged the appellant with the wages of the men he employed on his contract.

Under this state of the evidence the court instructed the jury for the appellee, in its first instruction given for him, that in case appellee was working by piece work, and appellant failed to furnish the lumber and stock to complete and finish such work, "then in law the plaintiff would be entitled to recover what his work was reasonably worth."

By the second of appellee's instruction, under similar circumstances recited in it, the court told the jury that appellee would "be entitled to recover for the labor he did perform on the work." In the third of appellee's instructions the jury was instructed by the court, that appellee, under similar circumstances recited, was "entitled to recover for the work he did do under the contract, and you (the jury) should so find."

Thus it will be seen that the basis of recovery laid down in the first instruction was on a *quantum meruit*, and the second and third were ambiguous as to the basis, but the jury was justified in believing, in connection with the first, that they meant that the recovery for appellee's work should also be on the basis of *quantum meruit*, and the appellee was entitled to recover for his labor for what it was reasonably worth.

It appears to be the law, where one enters into a con-

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tract to complete a piece of work for a stipulated sum, and is prevented from fulfilling it by the fault of the party for whom the work is to be performed, he is excused from complete performance, and may recover *pro tanto* at the contract price.

The appellee, in such case, is not bound by what it cost appellant to finish the work. A proper basis is to make an estimate of what proportion of the entire work was completed. That may be proven in other ways by any witness acquainted with such work, who could testify as to what proportion of the whole was finished.

The amount of what it cost appellant to complete the contract, is only evidence tending to prove what portion was done by appellee, if it be shown the contract price was a compensating one.

The appellee was not claiming for day's wages, and there seems to be no doubt as to the rule of law that the contract price should govern. *Dobbins v. Higgins*, 78 Ill. 440; *Fullett v. Hunt*, 21 Ill. 654; *Holmes v. Stummel*, 24 Ill. 370; *Wilson v. Bussman et al.*, 80 Ill. 493.

The first instruction was erroneous, and the second and third given for appellee, were misleading.

It is true the court laid down a different rule for the appellant, and directly contrary to appellee's first instruction, which left the jury a matter of choice to accept either rule it saw proper. An erroneous instruction is not cured by the giving of a proper one for the opposing side, unless the court can see, everything considered, that the jury was not misled, and that the verdict was clearly the proper one. And the fourth of the appellant's instructions is too favorable to it, as it tells the jury that if appellee did not complete the "beds he commenced" (whether by his own fault or not) "then the defendant would have a right to complete such beds and charge the reasonable cost of the same to Mr. McCabe."

It will be seen from what we have said, that in case appellee was compelled to abandon his contract on account of the fault of appellant in not furnishing material, then he

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could recover *pro tanto*, according to the prices fixed by its terms.

Appellee would not be in fault, and can recover in proportion to the work done at the contract price, without reference to what it may have cost appellant to complete it.

He would not be bound or estopped by the cost appellant incurred in finishing the beds, if it be conceded it wrongfully prevented him from completing his contract.

The rule of law announced by the instruction would allow appellant, of the money due appellee, compensating damages for failure to perform the contract, even if caused by the former's fault. If the contract had been taken under reasonable price, appellee must respond in damages at all events. This was allowable only where he had no justifiable cause in abandoning it.

From the evidence preserved in the record, we are not entirely satisfied that the verdict is just and supported by it.

For the errors of the court above indicated, the judgment is reversed and the cause remanded.

Vandervoort v. Rockford Insurance Company.

1. *Promissory Notes—Alteration of Instrument.*—In an action upon a promissory note, it appeared that it had been detached from another instrument, to wit, an application for insurance. *It was held*, that it formed no part of the instrument, and that its detachment did not render the note void.

Memorandum.—Action of assumpsit on promissory note. Appeal from the Circuit Court of Will County: the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, HALEY & O'DONNELL, ATTORNEYS.

The cutting off of a memorandum or contract attached to a note, which expresses the consideration upon which the

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note was made or given, is such a fraudulent alteration of the contract, as will render the note void. *Pigot's Case*, 11 Co. Rep. 28; *Bayley on Bills*, 59; *Homer v. Wallis*, 11 Mass. 309.

HILL, HAVEN & HILL, attorneys for appellee.

OPINION OF THE COURT, HARKER, P. J.

This was an action of assumpsit upon a promissory note given in consideration of an insurance policy, executed by appellee upon the buildings, stock and other property situated on appellant's farm.

The pleas interposed were, the general issue, *non est factum*, verified by affidavit, and a plea setting up that the note was obtained by fraud and circumvention. The case was tried by the court, the issues found for the plaintiff and judgment rendered for the amount of the note and interest.

We have carefully examined the evidence in the record and, although there is some conflict, have reached the conclusion that appellant signed the note sued on, that he at the time knew he was signing it, and that the agents of the company who solicited the insurance and procured the execution of the note, were not guilty of such fraud and circumvention as to render the note void.

It is contended that the note was not admissible in evidence, because it had been detached from another writing, executed at the same time on the same sheet of paper and which formed a part of the contract. The other writing was the application for insurance. It would be absurd to hold that it formed a part of the note and that by its detachment the note was vitiated.

Appellant has no just ground of complaint because the court refused propositions of law tendered by him. In our opinion the court's finding on the issues was supported by a clear preponderance of the evidence, and the judgment should stand. Judgment affirmed.

Higgins v. Lessig.

Higgins v. Lessig.

1. *Rewards—Contracts for.*—A person having an old harness of the value of \$15 stolen, becoming much excited over the matter, exclaimed: "I will give \$100 to any man who will find out who the thief is, and I will give a lawyer \$100 for prosecuting him. *It was held*, that the language used, under the circumstances, did not show an intention to contract to pay the reward, but was in the nature of an explosion of wrath against the supposed thief, coupled with boasting and bluster about prosecuting him.

2. *Rewards—Burden of Proof.*—A person claiming a reward for obtaining information concerning the identity of a thief, must show that he was the first to give the desired information, for if he was not the first to gain and impart the information, he can not recover.

3. *Rewards—Information Already Possessed.*—In an action to recover the amount of a reward offered for information concerning the identity of a thief, it was competent for the defendant to show that the information given him, and for which the recovery was claimed, was in his possession before, and was not new to him.

4. *Instructions—Rewards for Information Concerning Thief.*—In a suit to recover the amount of a reward for the discovery of a person who stole a harness, *it was held* error to instruct the jury to find for the plaintiff, if he discovered who stole the harness and informed the defendant, without requiring that he should have been the first person who ascertained the facts leading to the discovery of the thief, or the first who communicated it to the defendant.

Memorandum.—Action to recover a reward. Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

J. A. McKENZIE, attorney for appellant.

M. J. DOUGHERTY, attorney for appellee.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellant was the owner of a set of old double harness, worth perhaps \$15, which was taken from his premises

without his knowledge, and he offered a reward of \$100 for the recovery of the harness and the conviction of the thief. A few days afterward a boy named Wilt found part of the harness in appellee's berry patch, and appellant went with appellee to the place and brought that part of the harness into appellee's blacksmith shop. Appellant gave the boy who had found the harness a quarter of a dollar, and said he would give him a dollar to find the rest of it. Appellee claims that appellant at that time offered a reward of \$100 to the one who would find out who the thief was, and that he earned the reward. This suit was brought to recover the amount so claimed as a reward, and a trial resulted in a verdict and judgment for appellee for \$100.

The evidence showed that the defendant was much excited on the occasion, when it is claimed that the offer was made in the shop. Plaintiff's version of the language used was that defendant said, "I will give \$100 to any man who will find out who the thief is, and I will give a lawyer \$100 for prosecuting him," using rough language and epithets concerning the thief. There was evidence of substantial repetitions of the statement, together with the assertion that he would not have a second-class lawyer, either, and that he would not hire a cheap lawyer, but a good lawyer. The harness had been taken by a man called Red John Smith, who had been adjudged insane, and a Mrs. Phillips told the plaintiff that she saw Smith walking by with the harness on his back, on Sunday morning, which was the time when it was taken. Plaintiff watched Smith that night and saw him hiding the collars, and the next day he waited for the return of the defendant from Galesburg, and told him that Red John Smith had the harness. A search warrant was procured, and the remainder of the harness was found.

We do not think that the language used was such as, under the circumstances, would show an intention to contract to pay a reward, and think plaintiff had no right to regard it as such. Defendant had previously offered a very liberal reward for the return of the old harness and the

further about it. This testimony was stricken out by the court. It was competent for the purpose of showing that defendant had information before the plaintiff gave him any. The court also sustained objections to questions as to what Wilt told the defendant about Smith having the harness. The questions were competent to prove that plaintiff did not first gain or impart information, showing that Smith took the harness, but the fact was proved otherwise, and the ruling did no harm.

The first instruction for plaintiff was erroneous in directing a verdict for plaintiff if he discovered who stole the harness and informed defendant, without requiring that he should have been the first person who found out facts leading to the discovery of the person who took the harness, or the first who communicated such facts to defendant. Under this instruction he could recover, although the facts were first obtained by others, and the defendant was first fully informed of them by others. The judgment will be reversed and the cause remanded.

Kimmel v. Frazer.

1. *Forcible Entry and Detainer—Possession.*—Where the evidence fails to show that the plaintiff had possession of the land in controversy, the suit must fail.

2. *Forcible Entry and Detainer—Title.*—The means by which the parties obtained title to real property, can not be considered in an action of forcible entry and detainer.

Memorandum.—Forcible entry and detainer. Appeal from the County Court of Peoria County; the Hon. SAMUEL D. MEAD, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

H. W. WELLS, attorney for appellant.

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APPELLEE'S BRIEF, JACK & TICHENOR, ATTORNEYS.

The object of the statute is to protect an actual possession against forcible invasion. The question involved is the fact of possession only, and not the right of possession. A person may render himself liable to this action by entering upon his own premises by force, even when he has the right to immediate possession. 8 Am. & Eng. Enc. of Law, 119; Reeder v. Purdy, 41 Ill. 279; Huftalin v. Misner, 70 Ill. 205.

OPINION OF THE COURT, HARKER, P. J.

This is an action of forcible entry and detainer for ten acres of land in Richwoods Township, Peoria County, brought by appellee against appellant. Appellee claimed under a tax title and a prior possession in her daughter, Josephine Frazer. The land originally belonged to one Harriet Frazer. The husband of appellee was her agent and as such paid taxes, leased it and looked after it for sixteen years. He allowed the land to be sold for taxes, and appellant became the holder of a tax sale certificate for a part of the land, sold in 1883, and a tax sale certificate for the remainder, sold in 1884. These certificates were sold and assigned to Josephine Frazer, the daughter of the agent, and, there being no redemption, deeds were executed to her in 1885 and 1886. This title she held until 1888, when she quit-claimed to her mother, Susan Frazer, who brought this suit.

Deeds offered by the defendant to show extent of possession, show conveyance by Harriet Frazer and husband to F. E. Barber, of date April 4, 1889, conveyance by F. E. Barber and wife to Charles A. Kimmel, April, 1890. Kimmel also showed possession under the deeds. The proofs fail to show that Susan Frazer, or her grantor, the daughter, Josephine, ever had possession of the land after the tax title was procured. There was some confusion in the testimony as to occupancy of the land when D. C. Frazer, the agent of Harriet Frazer, and the father of Josephine, was controlling it. Under his supervision parties went upon the land, made improvements, and became tenants. We are satisfied, however, that this was while he was acting as the agent of

Harriet, and before the tax title matured. Such occupants were tenants of Harriet Frazer, appellant's grantor.

Kimmel found the land unoccupied and took possession. This he had the right to do. He did not invade the possession of appellee or any one.

We do not care to discuss, in this opinion, the good faith of the manœuvres of D. C. Frazer and his daughter, by means of which the tax title was procured. That can be considered when that title shall be tested in an appropriate form of action.

For the reason that the evidence fails to show that either appellee or her grantor ever had possession of the land, the judgment must be reversed and the cause remanded.

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City of Joliet v. Emma Blower et al.

1. *Cities and Villages—Damages in Grading Streets—Evidence of Proposed Improvements.*—In an action against a municipal corporation for damages, occasioned by cutting down the grade of a street, the court excluded evidence, offered on the part of the defendant, of the building of an abutment at the intersection of the streets with steps for foot passengers, etc., and the proposed erection of a bridge over the street cut down. This evidence consisted of proceedings of the city council in directing advertisements for bids, advertisements in pursuance of such directions and contract entered into, and the testimony of the city engineer, concerning plans made by him. It did not appear that there was any fixed and definite plan to be preserved and incorporated in the record so as to bind the city to carry it out. There was no ordinance or other record by which the city had determined upon any plan, but the attempt was merely to prove what the council had done in the way of advertising for bids and letting contracts. *It was held*, that the evidence was properly excluded.

2. *Cities and Villages—Purchase of Property on Streets.*—A purchaser of property on a street in a city can not be held to anticipate that the city will probably destroy the value of such property in a large measure by cutting down streets to accommodate people living on other streets, or that having cut down part of the street, and made an ample roadway for such people, it would then excavate the remainder of the street and cut off access to the property entirely.

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3. *Estates—Estimating Value of, etc.—Tables.*—Where it is necessary for the jury to determine the comparative value of a life estate and remainder in real property, it is competent to show and give in evidence computations, made by experts, under the various tables in general use, made by compiling statistics, and showing the general expectancy of life.

4. *Right of Action—When it Accrues.*—Where a street has been cut down, and access to it is destroyed, and damage had resulted to the property, the right of action is complete. If the city designed in the continuance of the work to do any act that would lessen the damage, it should have offered to bind itself to do the act so that the plaintiff might have an action in case of failure to do it.

Memorandum.—Action of case. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE FACTS.

This is an action of case, instituted by the appellees, as owners of the real estate named, subject to the life estate therein, of their mother, and for the recovery of damages to their reversionary interest in the property, occasioned by certain improvements in process of construction by appellant, in Exchange street in the city of Joliet.

The suit was commenced December 24, 1891, by Harriet H. Cust, the mother of appellees. Thereafter, appellees are brought into the suit as co-plaintiffs. This was done June 25, 1892. November 7, 1892, a motion was made for leave to file an amended declaration, and for leave to dismiss, as to Harriet H. Cust. November 9, 1892, an amended declaration was filed by, and in the name of Harriet H. Cust and appellees, as joint plaintiffs. January 7, 1893, the suit was dismissed as to Harriet H. Cust, and leave given to file the amended declaration theretofore filed. February 7, 1893, the plea of general issue filed to the original declaration, was ordered to stand to the amended declaration. The cause proceeded to trial on this issue.

GEORGE S. HOUSE, attorney for appellant.

EGBERT PHELPS, attorney for appellees.

OPINION OF THE COURT, CARTWRIGHT, J.

Bluff street, in the city of Joliet, runs north and south, along the base of a hill. Broadway is the next street west, and is on the top of the hill. Hickory street is the next street west of Broadway, and these streets are parallel with each other; Exchange street runs west from Bluff street, and intersects Broadway and Hickory. Lots four and seven, in block fourteen, in West Joliet, lie sixty feet north from Exchange street, between Broadway and Hickory. Lot four fronts on Broadway, and lot seven lies north, and extends from the rear of lot four to Hickory. This is residence property, having a house on lot four and a barn on lot seven. In order to improve the grade on Exchange street, and avoid going up the steep hill to Broadway for travel from Bluff street to streets west of Broadway, the city, some years ago, cut down about two-thirds of Exchange street, and carried Broadway over it with a bridge, but left the remainder of the street as a means of access from Broadway to Bluff street. There were then upper and lower roadways on Exchange street, and the situation is fully described in the case of *Joliet v. Shufelt*, 42 Ill. App. 208. Afterward the city excavated the whole street to the depth of the lower roadway, removed the upper roadway, and cut off all access to Exchange street from Broadway. Harriet H. Cust, the owner of a life estate in said property, brought this suit to recover damages resulting to her estate in the property from the last excavation, by which the upper roadway was removed.

Afterward, the appellees, who were owners of the remainder expectant upon the termination of the life estate, were admitted as plaintiffs, the suit was dismissed as to Harriet H. Cust and the declaration amended so as to seek a recovery for the injury to the remainder. There was a trial, resulting in a verdict for appellees for \$1,000, on which judgment was entered.

The first point relied upon for a reversal of the judgment is, that the court erred in excluding evidence of the proposed building of an abutment at the intersection of Broadway

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and Exchange streets with steps for foot passengers leading down into Exchange street, and the proposed erection of a bridge on Broadway across the cut on Exchange street. The evidence consisted of proceedings of the city council in directing advertisements for bids, advertisements in pursuance of such directions, and contracts entered into, and the testimony of the city engineer concerning plans made by him. Counsel for appellees says that all claims for damages, except such as resulted from cutting off access to Exchange street for wagons and carriages, were abandoned on the trial, and therefore the evidence was irrelevant. However that may be, there was no evidence of any fixed and definite plan to be preserved and incorporated in the record, so as to bind appellant to carry it out. There was no ordinance or other record by which appellant had determined upon any plan, but the attempt was merely to prove what the council had done in the way of advertising for bids and letting contracts. We think that the evidence was properly excluded.

It is next argued that the cutting down of Exchange street, so as to cut off access to it from Broadway, was such a change in the street as the purchaser of the property in question should be held to have anticipated as likely to occur in the improvement of the city, to meet the public wants, and that therefore there was no right of recovery. If the rule contended for is a proper one in any case, it seems clear to us that a purchaser of property on Broadway would not be held to anticipate that the city would probably destroy the value of such property in large measure, by cutting down Exchange street about fifteen feet, to accommodate people living on streets west of Broadway, or that having cut down part of the street and made an ample roadway for those living farther west, it would then excavate the remainder and cut off access to it entirely. That there was a right of recovery is well settled. *Rigney v. City of Chicago*, 102 Ill. 64; *C. & W. I. R. R. Co. v. Ayers*, 106 Ill. 511; *City of Bloomington v. Pollock*, 141 Ill. 346.

It is also objected that the court permitted an expert to

testify to computations made by him from mortuary tables, showing the comparative value of the life estate and remainder in the property according to those tables. It was necessary for the jury to determine that question, in order to fix the amount of damages to appellees' interest. The age of Harriet H. Cust was proved, and the expert gave the computations under the various tables, each differing from the other. The tables were the London, the Equitable, the Northampton, the Carlisle, the Wigglesworth, and another table not named. There was no suggestion to the jury as to the adoption of either of these tables, or any table. The question being submitted to the jury, we see no objection to affording them the aid to be derived from tables in general use, made by compiling statistics, and showing the general expectancy of life, which were generally accepted by the public and corporations in determining that question.

It is suggested that the suit was prematurely brought, inasmuch as the appellant had not completed the improvement when the suit was commenced. It was proved that the street had been cut down, the access to it destroyed, and the damage sued for had resulted to the property. The right of action was, therefore, complete, and if appellant designed in the continuance of the work to do any act that would lessen such damage, it should have offered to bind itself to do the act, so that appellees might have their action, in case of failure to do it. The jury were permitted to view the improvements, and the evidence shows that the abutment, with steps for foot passengers, was partly built, and the material for the bridge, consisting of the iron work and lumber, was on the ground. The jury saw all that had been done by appellant that would shed any light on the case, and were instructed to take their view of those things into account. Appellant had the benefit of all that had been done. We think that the action was not premature.

What has been said, disposes of all questions raised concerning instructions.

The judgment will be affirmed.

W. B. Duval v. T. C. Duval.

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1. *Jurisdiction—Accounting for Proceeds, etc.*—Equity has no jurisdiction to decree an accounting of the proceeds of the income of real estate and personal property alleged to have belonged to a deceased person in his lifetime, and received by a person acting in the capacity of an ordinary agent transacting the business of his principal, collecting and receiving money for him.

2. *Jurisdiction—County Courts—Probate Matters.*—County Courts have jurisdiction to hear and determine all matters of claims of the estates of deceased persons against all persons. The fact that the deceased person was a woman, and the claim is against her husband, who is administrator of her estate, can make no difference. The County Court had full power to compel him to account.

Memorandum.—Bill for accounting. Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

R. C. HUNT and A. M. BROWN, attorneys for appellant.

APPELLEE'S BRIEF, J. A. MCKENZIE AND E. P. WILLIAMS,
ATTORNEYS.

A court of equity will, in matters of probate, take jurisdiction only in an extraordinary case, a case in which there is special reason why administration should be withdrawn from Probate Court. *Freeland v. Dazey*, 25 Ill. 294; *Heustis v. Johnson*, 84 Ill. 61; *Crain v. Kennedy*, 85 Ill. 340; *Harding v. Shepard*, 107 Ill. 264; *Winslow v. Leland*, 128 Ill. 304.

A bill which seeks to take matters of administration into equity, must show some legal ground or reason for so doing. *Conover v. Hill*, 76 Ill. 342; *Harris v. Douglas*, 64 Ill. 469.

OPINION OF THE COURT, LACEY, J.

This was a bill in equity filed by appellant against T. C. Duval, in his lifetime, seeking an accounting by him for the

proceeds of the income of certain real estate and personal property alleged to have belonged to Nancy Duval, wife of T. C. Duval, and mother of complainant, in her lifetime, charging therein that T. C. Duval had managed Nancy's real estate in her lifetime, and had received large rents and profits therefrom, and had never accounted for them to her, and that after her death he had appropriated certain notes belonging to her and converted them to his own use. Appellant was the son of T. C. and Nancy Duval, and he makes six other children, one grandchild and four great grandchildren parties, after the filing of the bill and after the answer of T. C. Duval, and before trial, when the present appellees were made party respondent, who also answered.

The several answers deny the main allegations of the bill and claim that the land was deeded from Duval, Sr., to one Roundtree, for the purpose of having it deeded to his wife, which was done by Roundtree, and that such deed was never intended as a gift, and that the wife always treated it as the property of her husband, and gave him all the proceeds of it as fast as received, and also when the land was conveyed and sold to other parties by her, which was the case of all the land during her life. She gave up to him all the proceeds, notes and mortgage, according to the original intention, and that everything during her lifetime was treated as his, and that whatever title she had was by this means divested and all the property returned to her husband during her lifetime.

The answer to T. C. Duval, filed a short time prior to his death (he was then over eighty-seven years of age), avers that the deed, made by circumlocution, through Roundtree, was to shield his property from being taken to satisfy some unjust debts that were about to be brought against him.

The answer contains a demurrer to the jurisdiction of a court of equity and asks that the bill be dismissed.

Several respondents demurred to the bill, which was never acted on by the court. It seems that the deeds from T. C. Duval to Roundtree, a son-in-law, and from the latter to Nancy Duval, were dated September 6, 1866, and conveyed

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about 271 acres of land. In 1884, 160 acres of the land were sold by Nancy Duval and her husband, and a forty-acre piece, held in his own name, to C. M. Samuelson, for \$11,400, of which \$1,400 was paid down, and, by consent of Nancy, the notes for the balance were taken in Duval's name; they, after the death of the said Nancy Samuelson, not having paid the said notes given for the land, Duval, by agreement with him, received conveyance back, in his own name, for the 160 acres, and other tracts besides, and gave up his notes and mortgage.

All the other real estate was disposed of by Nancy during her lifetime—a portion of it as gifts to her children; so, at her death, March 16, 1888, she had none remaining.

Her husband was the administrator and settled up her estate, reporting personal assets belonging to her estate at \$2,500. The complainant never, so far as the evidence shows, interfered to compel his father to account for the large amounts of money he now claims were due from him to his mother's estate.

T. C. Duval and his wife, Nancy, lived together some eighteen years after the deed to her of the land in question, and it was always treated as his, and she often disclaimed any ownership over it, but said it belonged to her husband. We are well satisfied that the circumstances rendered it very probable that she would return the land or the proceeds to her husband, and therefore it requires less evidence than under other circumstances, to convince us that she actually did so. Another circumstance—that the notes were given by Samuelson to T. C. Duval, instead of to Nancy, shows what was intended, unless we could believe some fraud was intended by T. C. Duval to be perpetrated on his wife, which under all the circumstances, is not at all probable. T. C. Duval died in 1889, over eighty-seven years old.

We think clearly the appellant has failed to show any grounds for relief.

We are further of the opinion, the action of the court in dismissing the bill is justified on the ground that equity has no jurisdiction. T. C. Duval was not a trustee, if at

all, in any other sense than that of an ordinary agent, transacting the business of his principal, where he collects and receives money for him.

The County Court has jurisdiction to hear and determine all matters of the claim of the estate of Nancy Duval, deceased, against her husband, and the fact that the supposed debtor was administrator, can make no difference. The County Court had full power to compel him to account or remove him from the position of administrator for cause. *Heustis v. Johnson*, 84 Ill. 61; *Winslow v. Leland*, 128 Ill. 304.

The decree of the court below is therefore affirmed.

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Allen H. Mann v. William Mann et al.

1. *Merger—Conveyance by Mortgagor to Mortgagee—Exception.*—The general presumption of law when the owner of the greater interest in real estate conveys to the holder of the lesser interest, is that the title merges in the grantee; and in case of the grantee holding a mortgage and the grantor of the equity of redemption being a mortgagor, the legal presumption is that the mortgage debt is satisfied by the conveyance, and the grantee paid in full by the execution of the deed; but this presumption has many exceptions, especially where such a merger is detrimental to the holder of the mortgage.

2. *Accounting—Claim for Board, Clothing and Medical Attendance.*—In a suit for foreclosure and a cross-bill by defendants for an accounting of certain expenses, among which was a claim for furnishing necessary board, clothing and medical attendance, it appeared that it was not the intention of the party to charge for such furnishing at the time, and the claim was not allowed.

3. *Accounting—Claim for Taxes and Insurance.*—In an accounting upon a cross-bill in a foreclosure proceeding, it is error to allow an abatement of the amount due on the mortgage by reason of expenses incurred for taxes and insurance, where it was the duty of the party claiming such abatement to pay the taxes, and where he had a right to keep the property insured for his own benefit.

4. *Betterments—Made by Mortgagor.*—In an action to foreclose a mortgage, the defendant filed a cross-bill asking an accounting for betterments made by him upon the land; the claim was not allowed as the mortgage attached to all betterments as soon as made.

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Memorandum.—Foreclosure proceedings. Appeal from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, A. D. 1893. Opinion filed December 12, 1893.

APPELLANT'S BRIEF, JOHN D. SANDFORD, ATTORNEY.

Equity will not prevent a merger, where such prevention would result in carrying a fraud or other conscientious wrong into effect. 15 Am. & Eng. Enc. of Law, 315.

Taking a security of a higher nature, merges or extinguishes the inferior one. 15 Am. & Eng. Enc. of Law, 331.

"Where a deed for land on its face appears to be an unconditional and absolute conveyance, and is acknowledged and delivered, the law will presume, in the absence of proof showing the contrary, that it is what it purports to be, an absolute conveyance." Bently v. O'Bryan, 111 Ill. 53; Sharp v. Smitherman, 85 Ill. 153; Hancock v. Harper, 86 Ill. 445; Eames v. Hardin, 111 Ill. 634; Helm v. Boyd, 124 Ill. 370. "And the burden of proof is on party endeavoring to show the contrary." Knowles v. Knowles, 86 Ill. 1; Moran v. Pellifant, 28 Ill. App. 278; Blake v. Taylor, 32 N. W. Rep. 401.

APPELLEE'S BRIEF, MORRISON & WOOSTER, ATTORNEYS.

When a greater and a lesser estate meet in some person, it does not follow that a merger takes place. That will depend on the interest of the holder of the incumbrance, and if necessary to advance the ends of justice, a court will keep them separate, and when it appears that the deed was made as additional security, merger does not take place. Huebsch v. Scheel, 81 Ill. 281; Edgerton v. Young, 43 Ill. 464; Bank v. Cheeney, 87 Ill. 602; Fowler v. Fay, 62 Ill. 375; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Campbell v. Carter, 14 Ill. 286; Jarvis v. Frink, 14 Ill. 398; Jordan v. Cheney, 74 Me. 362.

STATEMENT OF FACTS BY THE COURT.

This was a suit in equity upon the original and cross-bill wherein Elizabeth Harrison, executrix of George Harrison,

deceased, as complainant, and Allen H. Mann, William T. Harrison and William Mann, as defendants, are parties to the original bill, and Allen H. Mann, as complainant, and William Mann and William T. Harrison and Elizabeth Harrison, as defendants, are parties to the cross-bill. The original bill was brought to foreclose certain mortgages owned by the complainant therein, as such executrix, on the southwest quarter of section twenty-nine, township twenty-one north, of range ten east of fourth P. M., executed by the defendants, Allen H. Mann and William T. Harrison, to Thomas J. Hollister and George Harrison respectively. It avers that William Mann also held a mortgage executed by the defendants, Allen H. Mann and William T. Harrison, on the same land, to secure two notes aggregating \$2,800, with interest thereon from April 13, 1883; that said mortgages of William Mann are subsequent to the mortgages owned by the complainant in the original bill, and prays that if any surplus remains after paying the said mortgages held by the complainant, that it be applied, so far as it will go, toward paying the said note running to the said William Mann. All the defendants filed answers; William Mann and William T. Harrison admitted the allegations of the bill, and charged that William Mann has often demanded the principal and the interest of the said notes of the makers, but has never been able to get any portion of the same. William Mann also answered and demurred, and by agreement of the parties, it was ordered by the court that Sherwood Dixon be appointed as special master in chancery to take proofs and report his findings thereon. Allen H. Mann obtained leave of the court to file a cross-bill, and the same was filed.

In substance, it claims the surplus of the proceeds of the sale of the land under the decree prayed, rendered in the original bill, which mortgage therein described he admitted to be valid and just. He sets up and charges that on the 19th day of March, 1884, and subsequent to the execution of the said notes and mortgage from him and William T. Harrison, said William Mann bargained for and purchased from the said William T. Harrison, the latter's interest in

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the premises covered by the said mortgage, for a consideration of \$4,500, and on that date William T. Harrison conveyed to the said William Mann all his interests in the said lands subject to all the incumbrances existing on it. The deed was a quit claim deed made subject to the incumbrances named in the original mortgages. The cross-bill further avers that the deed was given for the purpose of releasing defendant and orator Allen H. Mann from all liabilities on the notes and mortgage given to the said William Mann as aforesaid, and to give William Mann an equal interest with orator in said premises, subject to the Hollister and George Harrison mortgages respectively. The cross-bill then goes on to state the history of the transaction; that William T. Harrison and himself were the original purchasers of the said land and that the first mortgages named were given to secure the purchase money; that himself and William T. Harrison were the purchasers of the land and received a deed for the same for \$9,000, each of them paying down \$600, and that Allen H. Mann, complainant in the cross-bill, on the 19th day of March, 1884, paid William T. Harrison the sum of \$600, and assumed and afterward paid all the interest accrued on the note, and all taxes for the previous year as a part of the consideration of the said premises; that the 19th day of March, 1884, said William Mann lived with and made his home on the premises with orator. That during the time he furnished William Mann board, clothing and necessary medical attendance and care, for which he charges \$1,500; also charges William Mann with board, lodging, washing, medical attendance and other necessities furnished Martha Mann, wife of William Mann, from the 19th day of March, 1884, until her death, the 27th of December, 1885, also with her funeral expenses amounting to \$400; claims a bill for tiling on the premises for \$500, and a like sum for buildings and fences on the premises; charges that he has paid all the interest on the said notes from the 19th of March, 1884, to the 23d of June, 1891, \$330 per annum, amounting to \$2,600; paid the taxes on the premises during the same time. He claims also that he has conducted the

farming operations on the place and paid all the expenses; claims that the mortgage ought to be released, and that orator and William Mann be decreed to be equal owners of the premises, subject to the Hollister and Harrison mortgages, or in case the court should be of a different opinion, that an account be taken of the amount due orator of the sums of money so paid by him and for the care and maintenance of William and Martha Mann, and that William Mann be decreed to pay orator, and for general relief.

The different defendants in the cross-bill, Elizabeth Harrison, executrix, etc., answer the said cross-bill, denying all the material allegations set out, so far as it relates to the purchase of said land by William Mann for the consideration named in the cross-bill, and the release of the mortgage executed to William Mann; they admit that Allen H. Mann paid, in consideration of the quit-claim deed from William T. Harrison to William Mann, \$600; that William Mann lived with Allen H. Mann until 1891, but deny the furnishing by him the necessary board, clothing and medical attendance, and charge that when Allen H. Mann and William T. Harrison moved on the farm, William Mann and his wife moved on the farm and kept house for them, receiving no pay therefor except board, and the services they rendered were worth more than their board and clothing, and the medical care and attendance to them; and charges that Allen H. Mann has not placed more improvements on the farm than would keep it in good condition and repairs, not exceeding \$300; charges that Allen H. Mann, from the time the deed was made to William Mann, has the exclusive use and control and enjoyment of the premises, as well as the rents and profits of the farm; denies that there was ever any agreement made between William Mann and Allen H. Mann, that the said William Mann would release and cancel the notes and mortgage which he held on account of the making of the said deed to him; admits that on the 13th of August, 1892, William Mann commenced suits at law on his said notes against William T. Harrison and Allen H. Mann and intends to prosecute his suit at law; that he never

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agreed to cancel the said notes and mortgage, and that he never intended to release Allen H. Mann and William T. Harrison from the payment of it; charges the fact to be that he had no conversation with the said Allen H. Mann in regard to the making of the deed to him; that he learned from George Harrison, the father of William T. Harrison, that the latter was about to sell his interest in the premises, and that the deed was to be made to him; that George Harrison explained to him that the deed would be of but little use to him, but that he might take it as an additional security on the notes that he held, intending and supposing that he was receiving it as additional security on the indebtedness; that he did not intend or agree to cancel or release the said notes; claims that any surplus arising from the sale of the lands after satisfying the prior mortgages, be paid to him on the said indebtedness. To this answer, replication was filed, and a large amount of evidence was taken before the master, and the master reported his findings to the court, and among other things, reported and found that directly after the purchase of the land, the defendants, William T. Harrison and Allen H. Mann, took possession of the land and farmed the same until the time of the making of the quit-claim deed; that they were unmarried men; that William Mann and his wife went on the farm with them and kept house for them, performing necessary household duties, and William Mann also rendered some assistance in the farming operations; that after the deed was made, said William Mann and Allen H. Mann continued to reside on the said farm until on or about December, 1891, when the said William Mann left the farm and has not since resided there; that the wife of the said William Mann died on the 25th of December, 1885; that said Allen H. Mann was then married and that his wife, then, and thereafter, performed the household duties; said Allen H. Mann carried on the said farm, and William Mann assisted thereat; that the said Allen H. Mann, when an infant but a few months old, was left by his parents with the said William Mann and wife, and was by them reared and lived with them until about the year 1883,

at which time he was upward of twenty-three years of age; that while the relation of parent and child did not exist between them, yet there was no intention on the part of William Mann and wife, or either of them, or of Allen H. Mann and wife, or either of them, to make any charges for services rendered, one to the other, or for either to pay the other anything for services while they lived together on such farm, and that neither said Allen H. Mann nor William Mann is entitled to pay for any of those services; the said Allen H. Mann, from and after the making of the said deed to the said William Mann, took and received all the products and income derived from the said farm, paid all taxes thereon and for insurance of buildings, and paid for improvements; paid the interest on the Hollister and Harrison mortgages, so far as the same has been paid. And that the said William Mann derived his entire support and that of his wife, during her life, from the products of the said farm during that time until William Mann left the farm; that nothing has been paid on the William Mann notes and mortgage, and that when the said deed was made to the said William Mann by the said William T. Harrison, the only actual consideration paid therefor was the sum of \$600, paid by Allen H. Mann; that the \$2,800 borrowed from William Mann by William T. Harrison and Allen H. Mann, was used to pay off a \$2,500 note given to Hollister at the time of the purchase of the land; that by means of the conveyance from William T. Harrison to William Mann, the title to the premises became invested in William Mann and Allen H. Mann as tenants in common, subject to the mortgages theretofore given; the master finds that equity requires that the mortgage of William Mann should not merge into the title acquired from William T. Harrison, and that William Mann and Allen H. Mann should be regarded as the owners of the title, subject to the first mortgages, in proportion to the money that each had paid on the land—Allen H. Mann to twelve fortieths and William Mann to twenty-eight fortieths, and that Allen H. Mann should be entitled to pay for lasting improvements made on the premises, to wit, to laying

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tile drain, building a hog and hen house and fences thereon, and that it is not clearly shown that such expenditures have been in excess of the net income derived from the said premises, after paying taxes, insurance and interest as heretofore stated, and that in order to determine the equitable rights of Allen H. Mann and William Mann respecting the said rents and profits and improvements, an account should be taken on the basis of the twelfth finding, etc. Exceptions were taken to the master's report by both parties, and upon the hearing the court rendered a final decree of foreclosure in favor of Elizabeth Harrison for the amount of her claim and attorney's fees provided for in the mortgages, and found that there was due William Mann from said Allen H. Mann and William T. Harrison, the principal sum of \$2,800 and \$1,647.43 interest, making a total of \$4,447.43, and decreed payment of the said sum of money to the complainant; orders the sale of the property described in the mortgage, and orders the surplus, after paying the first mortgages, to be brought into court and paid on the amount due William Mann, unless the court shall, on the hearing of the cross-bill, order and decree that such surplus shall be otherwise disposed of, and such surplus shall remain in the court until the final distribution of the cross-bill, and in case that the said surplus shall be more than enough, it shall be paid to Allen H. Mann. Upon the hearing of the cross-bill, the court found the same way—that the mortgage to William Mann was a valid and subsisting lien upon the premises for the payment of the said sum due the said William Mann on the said notes, and found that neither Allen H. Mann nor William Mann expected to charge each other for work done, and neither is entitled to an accounting concerning the same, and found that the quit-claim deed from William T. Harrison to William Mann was given as additional security on the note of William Mann, and not in payment of an indebtedness.

OPINION OF THE COURT, LACEY, J.

The above statement gives an idea of the main facts of

the case, and the findings of the master and the court, but it does not give the substance of the evidence. It was quite voluminous, and it is somewhat difficult to determine with precise accuracy what the real intention of Allen H. Mann, William T. Harrison and William Mann was, in the transaction of procuring the execution of the quit-claim deed from William T. Harrison to William Mann; it seems, however, pretty plain to us, that William Mann had but very little to say about, or had much to do in the negotiations, further than that he acquiesced in the deed being made to him and accepting it, but the law generally presumes in such cases, where the grantor of the greater interest deeds real estate to the holder of the lesser interest, that the title merges in the grantee, and in the case of a grantee holding a mortgage, and the grantor of the equity of redemption being a mortgagor, the legal presumption is that the mortgage debt is satisfied by the conveyance, and the grantee paid in full by the execution of the deed; but this presumption has many exceptions, and especially in case such a merger is a detriment to the holder of the mortgage. In this case, William Mann only received a title from William T. Harrison for an undivided one-half of the premises, and it would seem hardly equitable to hold on the facts, without further proof than the receiving a deed for an undivided interest from one of the makers of a joint note and mortgage, and owners of the equity of redemption, that there could have been an intention on the part of William Mann to accept such deed in full satisfaction of such debt, where his mortgage covered the entire title to the land. We think that the rule of merger, without further extrinsic proof of some agreement to that effect, could not be presumed to have been intended; at least as to the entire title and as to the entire debt. There is no evidence from any witness that William Mann agreed with Allen H. Mann to accept the quit-claim deed in full satisfaction of his entire debt. We think, however, considering the fact of the acceptance of the deed, and all other evidence, that it was the intention to accept William T. Harrison's deed as an absolute

title and not as a mortgage, for he already had a mortgage, and that he intended to release and accept it in satisfaction of one-half of his debt, but not to release Allen H. Mann's half. Why should he release Allen H. Mann's half, when the half interest he was purchasing was not worth his entire claim, and when he could get William T. Harrison's undivided half for less?

There is another question in the case which we have considered with some care, and that is whether Allen H. Mann is entitled to a credit on his note for the \$600 which he paid William T. Harrison, in order to induce him to execute the quit-claim deed to William Mann. We are of the opinion that he is not entitled to such credit; it seems that Allen H. Mann and William T. Harrison, up to that time, had been farming the land in partnership, and that they had failed to agree any longer, and George Harrison was threatening to foreclose his mortgage. In order, as we think, to get the full possession of the farm, and to settle matters, he was willing to pay William T. Harrison that amount on his own account, to have the quit-claim deed executed. It appears from the evidence, that William Mann was never consulted as to whether he would allow such payment on his note. He was only asked to accept the deed, which he did; it was no particular benefit to him, so far as the mortgage was concerned, to accept a one-half interest in the deed for one-half of the debt and pay \$600 besides, when an undivided half, subject to incumbrances, was not worth more than half his mortgage. We think, therefore, that Allen H. Mann is not entitled to that credit; no credit of the kind was asked to be given or entered on the mortgage at the time, or since. William Mann was an old man at the time, and did not appear fully to realize the nature of such business transactions. We think the finding of the master and the court that no accounting, between William Mann and Allen H. Mann concerning the support furnished William Mann and his wife, and any claim of William Mann for services, need be had, for it was intended that each should be furnished gratis.

The surplus remaining, after paying off the amount of the decree rendered in the original case, should be distributed as follows, to wit:

1st. William Mann should be paid one-half of his entire note and interest held against the land and secured by his mortgage given by Allen H. Mann and William T. Harrison, according to its terms and without deductions on account of any counter claim of Allen H. Mann, and the court may refer the case to the master to compute the amount due.

The said note is not subject to any off-set on account of the payment of any interest by Allen H. Mann on prior mortgages given by him, for it was his duty as maker of all the notes and mortgages, to pay each when due, and it relieved the land for the benefit of junior mortgagees of so much prior indebtedness and liens. Nor is he entitled to any abatement by reason of any expenses incurred for betterments, taxes and insurance, for it was his duty to pay the taxes on the land, and he had a right to keep the property insured for his own benefit, and the buildings thereon. An existing mortgage would attach to all betterments as soon as made.

2d. If any surplus remains after the payment of the last described mortgage and interest, it should be equally divided between Allen H. Mann and William Mann, as tenants in common of the land, each owing an undivided one-half interest; in that case, an account should be stated between them, in regard to such last mentioned surplus, if any exist. Allen H. Mann should be charged with one-half of the net income received from the premises, while in the occupation of them from the date of the quit-claim deed to William Mann, and credited with one-half of the expenditures for valuable and lasting improvements put on the same by him, while in occupation during the same time. He should also be credited with one-half of the interest paid by him on the Hollister and George Harrison mortgages, after the date of the said quit-claim deed from William T. Harrison to William Mann; and upon such account being stated, the one entitled to the balance should have

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such balance deducted from the other's one-half of such last named surplus. In case it becomes necessary, on account of any surplus, to settle the account last above named, the court should refer the case to the master in chancery, or to a special master, if one be appointed to take the evidence, and state the account on the basis above named. And upon the master or special master's report, if such report be correct, the court shall enter a decree accordingly. The court should also dissolve the injunction heretofore granted, prohibiting the prosecution of the common law suit of William Mann v. Allen H. Mann and William T. Harrison, as to one-half of the note and interest sued on, and make it perpetual as to the balance.

The decree of the court below in this, the cross-bill, for the reasons above indicated, is hereby reversed, and the cause remanded to the court to settle the equities of the parties according to the principles indicated in this opinion. Reversed and remanded.

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1. *Master and Servant—Master's Liability for Acts of the Servant.*—An accident resulting in personal injuries was due to the improper management of persons operating an aerial railway, who were in the employ of the proprietor, but for an entirely different purpose—that of running a steamer as pilot and engineer, and had no authority or right to operate the railway. It appeared that the injured party wanted to ride, but was told that the railway was not running that day. He insisted on taking a ride, and the engineers said he guessed that they could run it; so they tied up the steamer and made the attempt, resulting in the accident in question. *It was held*, that no authority in the engineer and pilot to leave the steamer and undertake the operating of the railway, could be fairly implied from the nature of their employment.

2. *Instructions—Error in Giving—When Not Material.*—When an erroneous instruction has been given, but the Appellate Court is satisfied that the result of the suit was not affected by it, and the jury was not misled, the error is not material.

3. *New Trials—Newly Discovered Evidence.*—When the newly discovered evidence relied upon in support of a motion for a new trial is cumulative and not conclusive, it will not furnish ground for a new trial.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

A. M. BROWN and F. F. COOKE, attorneys for appellant.

APPELLEE'S BRIEF, G. W. THOMPSON, E. P. WILLIAMS AND M. J. DOUGHERTY, ATTORNEYS.

When a master's directions to a servant are specific, and the servant goes outside of his directions, and is not acting within the scope of his authority, the master is not liable for the result of unauthorized acts of servant. *Oxford v. Peter*, 28 Ill. 434; *Tuller v. Vogt*, 13 Ill. 277; *Wilson v. Peverly*, 2 N. H. 548; *Haack v. Fearing*, 5 Robertson, 528; *Stone v. Hills*, 45 Conn. 44; *Shearman and Redfield on Negligence*, Sec. 62, 63; *Woods' Master and Servant*, Sec. 28, page 548; *McKenzie v. McLeod*, 10 Bingham, 385; *Mitchell v. Crassweller*, 13 Com. B. 247.

No presumption of authority arises from an act being done for the master's benefit. *Redfield on Negligence*, Sec. 62; *Church v. Mansfield*, 20 Conn. 284.

"A new trial will not be granted on the ground of newly discovered evidence where such evidence is merely cumulative, and is not conclusive in its character." *Abrahams v. Weiller*, 87 Ill. 179; *Laird v. Warren*, 92 Ill. 204; *McKenzie v. Remington*, 79 Ill. 488; *Spahn v. People*, 137 Ill. 545.

OPINION OF THE COURT, CARTWRIGHT, P. J.

This is a suit brought by appellant against appellee to recover damages on account of personal injuries received in the falling of an aerial railway on which appellant was riding, and which was owned and maintained by appellee at a public resort near Galesburg, for the entertainment of patrons of the resort.

The grounds of liability charged in the declaration, were

the alleged defective construction of the railway with weak and insufficient materials, and furnishing incompetent and unskillful servants to operate the same. Upon a trial in the Circuit Court the appellant was defeated.

The resort in question was shown to have been advertised and maintained by the defendant, for the pleasure and amusement of the public. There was a lake, upon which there was a steamer, and there were also a natatorium, toboggan slide, picnic grounds and this aerial railway. Charges were made for the use of each device or accommodation furnished. On July 7, 1890, the plaintiff, together with Mr. Cooke, mayor of the city of Galesburg, Mr. Leach, an attorney, Mr. Heline, a train dispatcher, and other passengers, were at the resort, which was called Lake George Park, and boarded the steamer for a ride on the lake. The steamer came to a landing near the aerial railway, and the passengers, together with the engineer and pilot of the steamer, went to the railway. This aerial railway, as it was called, consisted of four wire cables 380 feet long, suspended across a ravine, and a basket containing two chairs was hung upon the cables with wheels, upon which it ran back and forth. There was a post at each end. The cables were fastened to one post, and at the other end were fastened to a ring attached to an iron hook, which was connected with the post by a device which enabled the operator to raise and lower it on the post. The raising and lowering was done by means of a "crab" or windlass, with a cog wheel arrangement. The railway was operated by raising and lowering the end at the hook. It could be raised nine feet higher than the other end, so that the basket would run down the incline to the other end. The end at the hook was then let down nine feet lower than the end where the basket would be, and the basket would run back. On this occasion, Mr. Cooke and Mr. Leach first got into the basket, and the engineer and the pilot undertook the operation of the railway. The basket was sent across to the other side, but on the return it stopped in the middle. This was probably due to letting the end at the hook down too slowly, so that the basket did

not acquire enough momentum to carry it over the natural sag in the cables. The basket was gotten back to the starting point and Cooke got out, and the plaintiff got into the basket. It was sent across as before, and again stopped on the return. The engineer and pilot and George Cowan then got on the wire, and moved it up and down. This necessarily produced a jerking, and the hook straightened out, allowing the cables with the basket to fall a distance of eighteen or twenty feet. The plaintiff was seriously injured in the fall.

It is urged that defendant was guilty of negligence in the construction of the railway, but, in our opinion, the evidence would not have justified that conclusion. The hook was proven to have been capable of sustaining many times the weight that was properly on it at the time of the accident, and there was no reason, apparent, for any precaution not taken. No accident would be anticipated under proper management. It would have sustained much more weight than the men who were on the wire, in addition to the wire and carriage and passengers, but for the efforts to move the wire up and down, to start the basket. It seems to have been the jerking of the cables produced by such motion that caused it to break, or straighten out. This was due to improper management of the persons operating the railway. Upon the question of liability of the defendant for such mismanagement, it is contended, on the one hand, that the engineer and pilot of the steamer were clothed, by the defendant, with such real or apparent authority to perform that service in his behalf, as to render him liable, and on the other hand, that no such authority was given. The evidence on the part of the plaintiff bearing on this point was, that the parties expressed a wish to ride, and the engineer and pilot left the steamer and went to the railway and undertook its operation, and one of them received the pay, which was offered back immediately after the accident. One witness testified that the same parties had operated it before, when he rode on it. The evidence for defendant was that the railway was only operated when there were crowds at the park, on special occasions, and then by an-

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other employe of defendant, who had charge of it; that the engineer and pilot were hired solely to run the steamer, and had no right or authority to run the railway, and that they had not operated it previously. The testimony of the engineer and pilot concerning their attempt to run it was that when the parties wanted to ride, they were told that it was not running that day, but they insisted on taking a ride, and plaintiff said that when they came out there they generally took in everything; that the engineer then said that he guessed they could run it, and they tied up the steamer and went up and made the attempt.

It seems to us that no authority in the engineer and pilot to leave the steamer, and undertake the operation of the railway, could be fairly implied from the nature of their employment, and certainly none was expressly conferred. The jury were justified in finding that they had no such authority, and the circumstances were not such as to lead the parties to believe that they were performing a duty incident to their employment, which was apparently that of engineer and pilot of the steamer.

The ninth instruction, given at the instance of the defendant, was objectionable in limiting the authority of the engineer and pilot to doing that for which they had received specific directions from the defendant, but we are satisfied that the result of the suit was not affected by the instruction, and that the jury was not misled. Other objections are made to instructions, which are not tenable.

It is contended that the court excluded proper evidence on the part of plaintiff, touching the advertisement of the park as a public resort; but the fact that the park was kept for that purpose, and that the public were invited there and charged for entertainment, was not in dispute, and was sufficiently proven otherwise. The error, if it was an error, was harmless.

An affidavit of newly discovered evidence was filed in support of the motion for a new trial, but the evidence was cumulative and not conclusive, and therefore did not furnish ground for a new trial.

The judgment will be affirmed.

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1. *Appeals—Practice—Abstract of Instructions.*—The Appellate Court may properly refuse to consider an assigned error in giving an instruction, where the instructions for the adverse party are not abstracted, the question not being properly raised, as the supposed error might have been cured by other instructions.

2. *Bill of Exceptions—Certificate of Evidence.*—A bill of exceptions, with only the certificate of the reporter, stating that it contained all the oral evidence, but lacking entirely the certificate of the judge that it contained all the evidence in the case, is not such a bill of exceptions as the law requires.

3. *Bills of Exceptions—Reporter's Certificate.*—The certificate of the reporter can not be substituted for that of the judge to a bill of exceptions.

4. *Presumptions—Absence of a Proper Bill of Exceptions.*—In the absence of such a bill of exceptions as the law requires, the presumptions are all in favor of the verdict and judgment, and the Appellate Court will presume that the evidence was sufficient to support the verdict.

Memorandum.—Trespass by domestic animals. Appeal from a judgment rendered by the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

C. H. PAYSON, attorney for appellant.

APPELLEE'S BRIEF, FREE P. MORRIS AND F. L. HOOPER,
ATTORNEYS.

Had appellant desired to question this instruction, he should have set forth the entire series of given instructions, and having failed to do so, the court may properly refuse to consider the objection. *Westphal v. Austin*, 39 Ill. App. 232; *Parry v. Arnold*, 33 Ill. App. 623; *Chapman v. Chapman*, 129 Ill. 390; *Hellmuth v. Katschke*, 35 Ill. App. 22; *Mueller v. Newell*, 29 Ill. App. 192.

Where a bill of exceptions does not show that it contains all the evidence introduced on the trial of a cause, it will be

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presumed in support of the judgment of the trial court, that there was all the evidence necessary to justify the judgment rendered. *Chicago, B. & Q. Ry. v. People*, 139 Ill. 536.

OPINION OF THE COURT, LACEY, J.

This was a suit commenced by appellee against appellant to recover for damages caused by the latter's stock and cattle getting through a partition fence and injuring the appellee's corn, originally commenced before a justice of the peace and appealed to the Circuit Court; their trial was had before a jury and resulted in a verdict for appellee for forty dollars, upon which the court rendered judgment, from which judgment this appeal is taken. The only error relied on for reversal, is the giving by the court below, appellee's second instruction, telling the jury that if it believed from the evidence that appellant's cattle got on the premises of appellee by breaking through the fence dividing their lands, and that the said fence was sufficient to turn ordinary cattle, and the said cattle broke through the fence, and that it was a good and sufficient fence, then the appellee would be entitled to such damages as the jury might find from the evidence he was entitled to. The third of appellee's instructions, however, defined what would be a legal and sufficient fence. This claimed error can not be insisted upon for the reason that the defendant's instructions are not abstracted, and therefore the question is not properly raised, as all supposed error might be cured by those instructions, and this court may properly refuse to consider the objection. *Westphal v. Austin*, 39 Ill. App. 232, and cases cited. *Chapman v. Chapman*, 129 Ill. 390; furthermore the evidence was not all preserved in the bill of exceptions or may not have been, as only a certificate of the reporter is found in the record certifying that the bill of exceptions contained all the oral evidence.

It lacks entirely the certificate of the judge that the bill of exception contained all the evidence in the case. The certificate of the reporter can not be substituted for that of

the judge. In the absence of such a bill of exceptions as the law requires the presumptions are all in favor of the verdict and judgment, and this court will presume that the evidence was sufficient to support the verdict without reference to the instructions.

The judgment of the court below is therefore affirmed.

Hulse v. Tollman.

1. *Assault and Battery—Evidence of Antecedent Facts.*—In the trial of an action for an assault and battery, an inquiry into antecedent facts is not proper, unless they are fairly to be considered as part of the same transaction. So held, where a party was allowed to prove the conduct and deportment of his adversary on previous occasions.

2. *Evidence—Former Controversies.*—In an action of trespass for personal injuries, the merits of former controversies occurring some weeks before the affair in question, are not material in determining the defendant's liability for committing the assault; whether the plaintiff was right or wrong, or whether his conduct was commendable on other occasions, is not in issue.

3. *Threats—When Competent.*—In an action for trespass for personal injuries, threats of the plaintiff are only competent to be considered in case the jury believe he made a hostile demonstration at the time of the assault, indicating danger to the defendant. Threats can only be considered for the purpose of giving character or coloring to some act of the plaintiff, and to aid the jury in determining whether the defendant acted from a reasonable fear of an assault upon him.

4. *Self Defense—Justification of an Assault—Threats.*—The fact that a plaintiff had a revolver in his coat and a slung shot in his hip pocket, could not justify an assault upon him, unless he did some act indicating an intention to carry threats, previously made by him, into execution—such an act that would induce, in a reasonable person, a belief that there was immediate danger of his doing so.

5. *Self Defense—Provoking a Difficulty.*—The law will not permit a person to provoke or bring on a difficulty with another and then avail himself of the plea of self defense.

6. *Instructions—Self Defense.*—Where, in an action for an assault, there is evidence tending to show that the defendant had provoked the assault, it was error to instruct the jury that the defendant had a right to assault the plaintiff and knock him down in order to protect himself, regardless of the fact that he provoked the difficulty where none would have otherwise occurred.

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7. *Instructions—Reasonable Belief in Self Defense.*—In an action for assault, an instruction stating that if the jury believe, “that the defendant believed that he had a reasonable ground to believe that the plaintiff meant to do him a bodily injury, he might assault him,” is erroneous. His belief must have been such as a reasonable person would entertain under the circumstances. His belief that the grounds of his belief were reasonable will not justify him.

8. *Self Defense—Reasonable Belief a Question for the Jury.*—In an action of trespass where the right of self defense is relied upon, the question as to whether the defendant’s belief that he was in danger was a reasonable one, is a question for the jury, and not for him to determine.

9. *Self Defense—How Much Force, a Question of Fact.*—The question of how much force a person may use in self defense, and what he may do, is a question of fact for the jury, and not one of law for the court.

10. *Instructions—Previous Threats and Present Danger.*—An instruction in an action of trespass to the person, where self defense is relied upon, which states to the jury that they have a perfect right to take into consideration threats of the plaintiff without requiring a belief that some act was done to carry them into execution, is erroneous, where the question as to whether such act was done is a disputed fact; unless the jury did believe from the evidence that some such act was done, the threats could not be considered.

11. *Burden of Proof—Self Defense.*—In an action of trespass, where it was stipulated that all pleas were in, the defendant undertook to establish a plea of self defense; *it was held*, that by this plea the assault was admitted, and the burden of proving that it was committed in self defense, was on the defendant.

Memorandum.—Trespass for assault and battery. Appeal from a judgment rendered by the Circuit Court of Iroquois County. The Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT’S BRIEF, C. H. PAYSON, ATTORNEY.

The law does not allow a person to bring an attack upon himself for the purpose of getting an opportunity to defend himself. *Forbes v. Snyder*, 94 Ill. 374; *Wilson v. People*, 94 Ill. 299.

If the plaintiff did not make the first assault, evidence of former threats would be incompetent for any purpose. “There is no principle, with which we are familiar, on which such evidence is admissible. Unless the threats

which it is proposed to prove are so recent as to become a part of the transaction being investigated, such testimony is not admissible, under any known rule of evidence, for any purpose." *Cummins v. Crawford*, 88 Ill. 317.

Previous threats are competent only to give character or coloring to some act of the party having made the threats. "If another threatens to kill me on sight, and I know of such threat, and on meeting my enemy, without fault on my part, he makes a demonstration apparently hostile, and I kill him, I have a right on trial to prove my knowledge of the previous threats, that the jury may determine whether I really acted from a reasonable apprehension that my enemy was about to kill me or do to me great bodily injury." *Forbes v. Snyder*, 94 Ill. 377; *Gilmore v. People*, 124 Ill. 380.

It is not competent to prove as an excuse for a battery that several days before it was committed the plaintiff had threatened the defendant. *Heiser v. Loomis*, 47 Mich. 16; *Thrall v. Knapp*, 17 Ia. 468.

The defense was self defense, and upon this question the burden of proof was upon the defendant. From the moment the defendant admitted he struck plaintiff a violent blow with a deadly weapon, the burden of proof was upon him, and not the plaintiff. The error in this instruction alone should reverse this case. *Gizler v. Witzel*, 82 Ill. 322; *Chicago R. I. & P. v. Barrett*, 16 Brad. 17.

APPELLEE'S BRIEF, C. W. RAYMOND, ATTORNEY.

Where the result reached by the jury is clearly right it will never be reversed for errors which do not affect the substantial merits of the case. *Wilson v. The People*, 94 Ill. 299; *Calhoun v. O'Neil*, 53 Ill. 354; *Leach v. The People*, 53 Ill. 311.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellant, a minor, by his next friend, brought this suit in trespass against appellee to recover damages for an assault. No pleas were filed, but it was stipulated of record

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by the parties that all pleas to the declaration, and all replications to such pleas, should be considered in. The cause was tried and resulted in a verdict of not guilty, and judgment was rendered against appellant for costs.

On the trial, the assault was admitted by the defendant and the defense interposed was that it was committed in self defense. There was but little controversy as to the facts, and they were substantially as follows: On the evening of Sunday, December 20, 1891, the plaintiff, with Frank Casper and John Beckman, were visiting at the house of Fred Frahling. After supper, the plaintiff, on the invitation of Casper, went with the other boys to the defendant's residence, about forty rods north of Frahling's, on the same road. After staying there a few minutes the defendant joined the party, and they all went south on the road to meet two boys with girls. They went south about half a mile, and met the boys and girls, and then turned and came back toward Frahling's. When they reached Frahling's gate they stopped. Up to this time there had been no trouble or unpleasantness of any kind, but everything had been pleasant and peaceable. The defendant was a little ahead of plaintiff, and was with a young man named Witte.

The defendant then turned to Witte, and pointing with his finger to plaintiff, asked a question, which is given in somewhat different language by different witnesses, but which was substantially as follows: "Is this the fellow that is going to lay our bones across each other?" Witte said, "Yes." Plaintiff commenced to speak, and, according to his testimony, said: "No" or "I," and according to defendant's testimony, said "I—I—," but did not get any further, nor have time to say anything more, when the defendant, who had drawn a knife from his pocket, struck him in the face with the closed knife, making a penetrating wound on the right side of the face near the eye, extending into the nasal cavity, breaking the bones, knocking out two teeth and fracturing another. The plaintiff was knocked down, and lay there a short time, when he got up on his knees.

and shortly after got up and went away. Plaintiff claimed that he was attempting to deny any intention to do as defendant stated, and the witnesses so understood it. As one of the defendant's witnesses stated it, "He wanted to excuse himself as though he didn't say it." The only controverted question of fact was whether plaintiff at that time put his hand on his hip pocket. On that question the evidence was conflicting. There was no clear preponderance of the evidence on this trial that he did so, and there was evidence that defendant, when testifying before a justice of the peace, said that plaintiff had his hands in his front pockets when he struck him. There had been trouble between the parties a few weeks before and they were not friendly. Each one had made threats against the other, which had been communicated to the party threatened, some time previously.

On the cross-examination of the plaintiff, the defendant was permitted to inquire into the details of the previous troubles between the parties; and the bulk of the evidence in behalf of the defendant consisted of accounts of those occurrences, apparently for the purpose of elucidating to the jury the merits of the difficulties which had occurred before, having no connection with the assault. In going into these details the defendant was allowed, not only to prove the conduct and deportment of the plaintiff on previous occasions, but also what one Bolan did and said, and threats made by him on those occasions against defendant.

Bolan was in no way connected with the affair at the time of the assault, and evidence concerning him was wholly irrelevant. The merits of former controversies occurring some weeks before, were not material in determining defendant's liability for assaulting the plaintiff. Whether plaintiff was right or wrong, or whether his conduct was commendable on other occasions, was not in issue. A right to assault him could not arise out of facts of that kind, nor would they tend, in any degree, to mitigate the damages suffered. An inquiry into antecedent facts is *not* proper, unless they are fairly to be considered as part of

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the same transaction. *Cummins v. Crawford*, 88 Ill. 312. The threats of the plaintiff were only competent to be considered in case the jury should believe that plaintiff made a hostile demonstration, at the time of the assault, indicating danger to the defendant. They could only be considered for the purpose of giving character or coloring to some act of the plaintiff, and to aid the jury in determining whether defendant acted from a reasonable fear of an assault upon him. *Forbes v. Snyder*, Admx., 94 Ill. 374.

Plaintiff was armed at the time of the assault. He had a revolver in his coat pocket, and a slung shot in his hip pocket, where, it is claimed, that he put his hand. The fact that he was so armed could not justify the assault, unless he did some act indicating an intention to carry his threats into execution, such as would induce in a reasonable person a belief that there was immediate danger of his doing so. Conceding that the jury were justified in finding that he did put his hand to his hip pocket, the circumstances and the manner of the defendant in commencing a quarrel would rather indicate an intention on the part of the plaintiff in such act of preparing for his own defense than of assaulting the defendant. He was attempting to deny the charge made, or to excuse himself in some way, as was plainly apparent. The defendant started the trouble himself. There had been nothing said or done before that by plaintiff indicating any intention to bring on any difficulty. The circumstances did not authorize any inference on the part of defendant that plaintiff had turned aggressor, and was about to assault him. That defendant provoked the difficulty, is too clear for argument. There is not the slightest reason to suppose that there would have been any trouble if he had not commenced it. The law will not permit him to provoke or bring on a difficulty with the plaintiff, and then avail himself of the plea of self defense. *Gainey v. People*, 97 Ill. 270; *Adams v. People*, 47 Ill. 376. The brutal assault was made almost instantly after defendant turned around and asked the question of Witte, and before the plaintiff could say anything, and the evidence did not make out a case of self defense.

The second and fifth instructions given for the defendant, were as follows :

You are further instructed for the defendant, that if you believe from all the evidence that Tollman saw Hulse throw his hand around to his hip pocket, and if you further believe from the evidence that Tollman believed he had reasonable grounds for believing that Hulse at that time meant to do him bodily injury or make an assault upon him, then Tollman had a right to assault Hulse and knock him down if necessary, in order to protect himself, using no more force than was reasonably necessary.

You are further instructed that if you believe from the evidence that the defendant believed he had reason to believe that the plaintiff in this case was about to inflict upon him great bodily harm, or strike him or wound him, then he had a right to assault the plaintiff and strike him down; and if you believe that the assault which the defendant made upon the plaintiff in this case was made in his necessary self defense, and that the defendant used no more force than was necessary, then you should find the defendant not guilty.

These instructions were both bad in stating that defendant had a right to assault plaintiff and knock him down, or strike him down, in order to protect himself, regardless of the fact that he had provoked the difficulty where none would otherwise have occurred. They were also wrong in stating that if the jury believed that the defendant believed that he had a reasonable ground to believe that plaintiff meant to do him a bodily injury, he might assault him. His belief must have been such as a reasonable person would entertain under the circumstances, and his belief that he had reason to believe, or that the grounds of his belief were reasonable, would not justify him. Whether his belief was a reasonable one under the circumstances was a question for the jury, and not for him. The latter instruction also asserted the right of the defendant to strike the plaintiff down if he had such a belief. The question of how much force would be reasonably necessary for self defense, and what defendant might do, was for the jury and not the court.

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The sixth instruction for defendant, was as follows:

You are further instructed, that in coming to a verdict you have a perfect right to take into consideration all the threats, if any are proved, which Hulse might have made against Tollman, if you believe that these threats were finally made known to Tollman, and then to say from all the evidence and circumstances in the case, whether or not you believe that Tollman had reason to fear an assault upon himself and struck Hulse in self defense.

This instruction was erroneous in telling the jury that they had a perfect right to take into consideration, threats of plaintiff, without requiring a belief that plaintiff did some act to carry them into execution. This was a disputed fact, and unless they should believe that some act was done, the threats could not be considered.

The eighth instruction for defendant told the jury that the burden of proof in the case rested on the plaintiff, and that before he would be entitled to a judgment, he must prove his case by a preponderance of the evidence. The assault by defendant was admitted, and the burden of proving that it was committed in self defense was on the defendant. It was stipulated that all pleas were in, and the defendant undertook to establish a plea of self defense, under which the burden was on him. The instruction was wrong in casting the burden of proof on all the issues on plaintiff. *Gizler v. Witzel*, 82 Ill. 322.

For the errors indicated, and because the verdict is against the evidence, the judgment will be reversed, and the cause remanded.

Boynton v. Pierce et al.

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151 197

1. *Redemption for Judicial Sales—Purchase of Master's Certificate.*—Where an owner of an equity of redemption purchased, and took an assignment of the certificate of purchase, under the master's sale, it did not appear whether the purchase was before or after the expiration of

the twelve months from the date of the sale, allowed him for redemption. *It was held* that the burden of proof was upon him to show that such purchase was within the twelve months, and not having done so, the court would assume that it was after, and, that being so, his title and right to redemption was entirely gone.

2. *Redemption—Effect on the Assignment of the Certificate of Sale, to the Owner of Equity.*—Where the owner of an equity of redemption purchased and took an assignment of the certificate of sale, issued by the master in chancery, after the expiration of the statutory period allowed him for redemption, *it was held* that such purchase and assignment did not inure to him as a redemption from the sale, and discharge of the debt, or affect the right of redemption under it by judgment creditors.

3. *Judicial Sales—Payment to Purchaser When a Redemption.*—A payment by the owner of the equity to the purchaser, of the amount of his bid and interest, and taking the assignment of the certificate of purchase, is not a redemption as required by statute, and will not prevent a judgment creditor from redeeming under the statute.

4. *Mechanics' Lien—Effect of the Sale Under a Decree of Foreclosure.*—Proceedings in foreclosure under the mechanics' lien law, do not bar the right of judgment creditors to redeem the premises from the master's sale in such proceedings. Such creditors may redeem after the expiration of the twelve months allowed by the owner of the equity, and will not remit them to the fund resulting from a sale of real estate under the foreclosure of the lien.

5. *Redemption—Junior Creditors.*—A junior creditor may redeem from a sale under the senior judgment, and cut off intervening liens.

6. *Redemption—The Right Favored in Law.*—The right of redemption by the judgment creditor after the statute time given to the judgment debtor expires, is encouraged by law; it is a boon to the debtor, and pays his debts which otherwise would remain unpaid, and is proper law.

Memorandum.—Bill to remove cloud from title of real property. Appeal from decree entered by the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

HOPKINS, ALDRICH & THATCHER, attorneys for appellant.

APPELLEES' BRIEF, CHAS. WHEATON AND D. J. CARNES,
ATTORNEYS.

There is only one way which will prevent a judgment creditor, who holds an intervening lien, from enforcing his

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lien, and that is by a redemption in the manner pointed out by the statute. *McRoberts v. Conover*, 71 Ill. 524; *Lloyd v. Karnes*, 45 Ill. 62; *Schroeder v. Bauer* (Ill.), 29 N. E. Rep. 560.

A junior judgment creditor may redeem from a sale on a senior judgment and cut off intervening liens. *Sweezy v. Chandler*, 11 Ill. 445.

Where a person pays an incumbrance he is under a duty to pay, or for which he is primarily liable, he extinguishes it. *Shields v. Moore*, 84 Ind. 440; *Kreider v. Isenbice*, 123 Ind. 10; 23 N. E. Rep. 786; *Shirk v. Whitten* (Ind.), 31 N. E. Rep. 87.

OPINION OF THE COURT, LACEY, J.

This was a bill in equity filed by the appellant, claiming to be the owner of the northwest fractional quarter, and the northeast quarter of section nineteen, town thirty-nine, north, range five east of the third principal meridian, and seeking by his bill to set aside an attempted redemption by the appellees from under a sale to enforce a mechanics' lien by one Wilcox, and to set aside a levy made by the sheriff on the land in question of an execution in appellees' favor, against Wilcox, a former owner of the land, issued from the Circuit Court, and also to set aside a certificate of redemption made by the sheriff in the same case, as a cloud on the title of the appellant's land, also asking for an injunction prohibiting the sheriff from selling under the execution, and a prayer for general relief. Reuben J. Holcomb, one of the appellees, was the sheriff in the case. By the original and amended bills, it appears that one W. C. Wilcox was the original owner of the land in question, and that he had mortgaged the same by a first mortgage to John Waterman, a second mortgage to John Sturtevant, a third mortgage he executed to one James S. Waterman, and a fourth mortgage was executed to the appellant to secure something over four thousand dollars, dated December 1, 1869. As a fifth lien, appellees Pierce and Dean recovered a judgment in the Circuit Court against Wilcox for the sum of \$792.82, which is the judgment and execution following, under which

the redemption in question was attempted. Prior to that, in the latter part of May, 1874, William Loomis obtained a decree in the Circuit Court as the surviving partner of Samuel Loomis, against Wilcox, the appellees and the appellant herein; and others in a mechanics' lien proceeding. In the said last named proceeding all were defaulted, except the appellant, who answered, and the court found that the petitioner's claim in the mechanics' lien suit was for material used in erecting a dwelling house on the premises then owned by Wilcox, that the amount due was \$549.30, and found that the appellant was a purchaser of the said land from Wilcox subsequent to the furnishing of the material, and that he stipulated and agreed to pay the complainants the amount mentioned in their promissory notes given for such material, and ordered that unless the defendants, or some of them, make payment of the amount by April 1, 1875, that the master make sale, and pay, first the costs of that suit and the sum found due, and the surplus, if any, to the clerk of the court, to await the further order of the court. On March 18, 1878, Pierce and Dean, judgment creditors, redeemed, or attempted to redeem, the land in controversy from the master's sale of December 19, 1876, as judgment creditors of the said Wilcox, and having levied their execution on the premises in question, and paid the full amount of the redemption money to the sheriff, the sheriff made out and filed his certificate of redemption in the recorder's office the same day. Some time prior to the redemption, which was made after the twelve months had expired from the date of the master's sale, and before the fifteen months had expired, appellant purchased the certificate of sale issued by the master. The evidence fails to show whether he purchased it before or after the expiration of the twelve months, but he purchased it of Loomis at some time and took an assignment of it to himself. No certificate of redemption was filed by him or any one, nor any satisfaction of record was made of it. The questions raised before the court below and also here, by counsel for appellant, are two: first, that the appellant, being the owner of the equities of redemption, and having purchased and taken an assign-

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ment of the certificate of purchase under the master's sale, became invested with the full title, free and clear of any right of redemption on the part of judgment creditors, and that such act of purchasing the certificate was in itself a payment, and a complete redemption. And, second, it is insisted that the proceeding in the mechanics' lien foreclosure forever barred the right of Pierce and Dean to redeem under the master's sale under any circumstances; that they were remitted to the fund resulting from the sale of the real estate under the lien foreclosure, citing as authority for such contention the case of *Topping v. Brown*, 63 Ill. 348. Those are the questions we are called upon to decide. The evidence fails to show whether the appellant purchased the certificate of purchase in question from Loomis before or after the expiration of the twelve months from the date of sale. The burden of proof being upon him to make out a case it was incumbent upon him to make such proof. We will assume, therefore, that it was after the twelve months; that being so, his title and right to redeem was entirely gone, and the only real title that he had remaining in him after the expiration of the twelve months, and the purchase of the master's certificate, was the certificate itself, and the hope he had of acquiring a deed under it.

But the judgment creditors had also a right under the statute to redeem after the expiration of the twelve months. Under these circumstances we think the appellant failed to sustain his point that his purchase of the certificate was payment of it, but we are even inclined to think that under the principle announced in the case of *McRoberts v. Conover*, 71 Ill. 524, cited by appellees, the purchase of the master's certificate and the assignment of it to the appellant would not inure to him as a redemption, a full discharge of the Loomis claim, and bar the right of redemption under it by judgment creditors, much less would such be the case after the expiration of the twelve months.

While the facts of the above case are not precisely the same as they are in this suit, in that the purchaser of the certificate was not the owner of the equities of redemption at the time, but only liable on his warranty to his grantee,

we think the principle would be the same, judging from the tenor of the opinion of the Supreme Court. We cite also *Lloyd v. Karnes*, 45 Ill. 62; *Shroeder v. Bauer* (Ill.), 29 N. E. Rep. 560.

The second point made, we think not well taken. The case of *Topping v. Brown*, *supra*, cited by appellant, we do not regard as analogous. In that case it was an attempt of a holder of a mortgage to foreclose it against the holder of the title, acquired under a decree of foreclosure in a mechanics' lien case where the same mortgagee was a party to the foreclosure. The principle seems to be sound that the party in that case, seeking to foreclose his mortgage subsequently, should be held estopped by the decree from disputing the title of the owner under the mechanics' lien deed; in this case, the appellees are not attempting to assert a title superior to Loomis' foreclosure, but in insubordination to it. Their judgment was certainly not paid off by anything done in the mechanics' lien proceedings nor did they receive anything on it; it remained a subsisting judgment against Wilcox. The most that can be claimed is that the judgment lien was extinguished in favor of the Loomis foreclosure. Had Loomis acquired a deed under the master's certificate, the judgment lien would, no doubt, have been forever extinguished as to the land in question, but under the present circumstances the judgment creditors acknowledge the superiority of Loomis' certificate and desire to pay it off. It is not necessary that there should be a judgment lien in order to authorize a redemption, and a junior judgment creditor may redeem from a sale on a senior judgment and cut off intervening liens. *Sweezy v. Chandler*, 11 Ill. 445.

The right to redeem, by a judgment creditor, after statutory time given to the judgment debtor of twelve months expires, is encouraged by law; it is a boon to the debtor, and pays his debts, which otherwise would remain unpaid, and his property lost.

We think, under the facts and circumstances of this case, that decree of the court below in dissolving the injunction and dismissing the bill was correct. The decree of the court is therefore affirmed.

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1. *Mechanics' Liens—Repealing Statutes—Saving Clause.*—Where a decree for a mechanics' lien was rendered, and afterward, and before any further proceedings were had thereunder, an act of the legislature went into effect repealing the law under which the decree was rendered, and without any saving clause, as to proceedings begun and pending under the repealed law, *it was held*, that a sale by a master, under the decree, was unauthorized and void. By the repealing act, all right to proceed under the decree was taken away.

2. *Statutes—Repeal and Saving Clauses.*—Where a statute is repealed without any saving clause, as to all proceedings pending under it, except such as are past and closed, it must be considered as if the statute had never existed.

3. *County Courts—Chancery Jurisdiction.*—The County Court of De Kalb County was not invested with chancery jurisdiction by the act of 1863.

4. *Mechanics' Liens—Chancery Jurisdiction—Proceeding to Foreclose Not a Chancery Proceeding.*—The act of the legislature approved April 25, 1873, providing that in all cases where chancery jurisdiction has been conferred upon County Courts by special enactment, and such chancery jurisdiction has been repealed or has ceased to exist by virtue of the act in force July 1, 1872, all causes pending, together with the records, files and papers pertaining to such chancery jurisdiction, shall be transferred to the Circuit Courts, does not contemplate statutory proceeding to enforce a mechanics' lien.

5. *Redemption—Under Void Judicial Sales.*—If a judicial sale is void, it follows as a logical sequence that a subsequent redemption by a judgment creditor and a sale under his judgment is void.

6. *Decrees of Court—By Whom Executed.*—A decree of the Circuit Court can be legally executed only by an officer of the Circuit Court.

7. *Estoppel—Doctrine of—When Applied.*—The doctrine of equitable estoppel can not be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act which, though void, has been open to the inspection of all.

8. *Estoppel in Pais—Fraud.*—An estoppel *in pais* is based upon a fraudulent purpose and a fraudulent result. Before it can be invoked to the aid of a litigant, it must appear that the person against whom it is to be invoked, has, by his words or conduct, caused him to believe in the existence of a certain state of things and induced him to act upon that belief. If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party can not say he has been deceived thereby, and is entitled to the application of the rule.

9. *Estoppel—Essential Elements.*—The essential elements of an estoppel *in pais* are, misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance upon his part in acting upon the representations.

10. *Real Estate—Clouds upon Title.*—A judicial sale of real estate made under a void decree, and subsequent sales on redemption, are clouds upon the title of real property.

Memorandum.—Bill for an injunction. Appeal from a decree rendered by the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, A. D. 1893. Opinion filed December 12, 1893.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, HOPKINS, ALDRICH & THATCHER,
ATTORNEYS.

Where a statute is repealed, it must be considered, except as to transactions past and closed, as if it had never existed. * * * The repeal of a statute conferring jurisdiction, takes away all right to proceed under the repealed statute, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute. Ill. & Mich. Canal Co. v. South Chicago, 14 Ill. 334; Assessors v. Osbornes, 9 Wallace 575.

It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. And it is equally clear that where a jurisdiction conferred by a statute is prohibited by subsequent statute, the prohibition is so far a repeal of the statute conferring jurisdiction. Insurance v. Richie, 5 Wallace 544; Norris v. Crocker, 13 Howard 429.

The doctrine of estoppel *in pais*, or equitable estoppel, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel; as if both parties are equally cognizant of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acting solely upon his own judgment. There must be deception and

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change of conduct in consequence, in order to estop a party from showing the truth. Davidson v. Young, 38 Ill. 152; Herman on Estoppel, §§ 428, 798, 969; Bigelow on Fraud, 467; Mill v. Epley, 31 Pa. 331, and Mills v. Graves, 38 Ill. 465.

CHAS. WHEATON and D. J. CARNES, attorneys for appellees.

OPINION OF THE COURT, HARKER, P. J.

On June 29, 1872, on a petition to enforce a mechanics' lien, the County Court of De Kalb County rendered a decree in favor of R. Ellwood & Co., as material-men, for the sum of \$534.58, against W. C. Wilcox, and the premises described in the petition, consisting of one hundred and six acres of farm land. The decree provided that unless Wilson, or some of the parties made defendant with him as mortgagees or otherwise, should within a day named, pay the sum found due and costs, the land should be sold by Charles Kellmum, a special master appointed for that purpose. The proceedings were had under an act of the legislature passed in 1863, conferring upon the County Court of De Kalb County concurrent jurisdiction with the Circuit Court, in all suits and proceedings at common law or by statute.

Two days after the decree was rendered, July 1, 1872, there went into effect an act repealing the law of 1863, without any saving clause as to proceedings begun and pending under the old law.

On the 14th of December, 1872, the special master sold the premises, and Ellwood & Co. became the purchasers. On the 10th of March, 1874, there was a redemption from the sale to Ellwood & Co., under a judgment in favor of Norman C. Warren, and against Wilcox, and on the 13th of April, 1874, a sale on execution was made by the sheriff to George P. Wild, for \$1,425. On the day of the sale to Wild, Daniel Pierce and Moses Dean, as judgment creditors of Wilcox, redeemed from that sale, and the sheriff advertised the land for sale under their execution.

Thereupon, appellant, who had been a mortgagee of Wil-

cox, and had, prior to the sale by the special master, received a deed of conveyance from Wilcox, filed a bill in the Circuit Court of DeKalb County, to enjoin the sale advertised under the Pierce and Dean execution, and for a decree setting aside the special master's sale, and all the proceedings had thereafter by way of redemption. A temporary injunction restraining the contemplated sale was granted, and after pending for a period of thirteen years, the cause was sent to the Circuit Court of Kane County on change of venue. There was a hearing at the October term, 1892, of the last named court, and a decree rendered dissolving the injunction and dismissing the bill.

We entertain no doubt upon the proposition that the sale by the special master on the 14th of December, 1874, was unauthorized and void. By the repealing act of 1872, all right to proceed under the repealed statute was taken away. There was no right to proceed under the decree rendered before the repealing statute went into effect, because there was no saving clause as to pending proceedings, as is usually the case where a law is repealed. Where a statute is repealed without such saving clause it must be considered, except as to proceedings passed, and closed as if it had never existed. *Illinois and Michigan Canal Co. v. South Chicago*, 14 Ill. 334; *Blake v. Peckham*, 64 Ill. 362; *Assessors v. Osbornes*, 9 Wallace, 570.

The case of *Elwood & Co. v. Wilcox*, was continued on the docket of the County Court of DeKalb County from term to term, after the repeal of the law conferring jurisdiction, with report of sale by the special master, undisposed of until November, 1873, when it was transferred to the Circuit Court of that county. The Circuit Court at its November term, 1874, confirmed the report of sale by the special master. The transfer, it is claimed, was authorized by virtue of an act of the legislature, approved April 25, 1873, providing:

"In all cases where chancery jurisdiction has been conferred upon County Courts by special enactment, and such chancery jurisdiction has been repealed, or has ceased to exist by vir-

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tue of said act in force July 1, 1872, all causes pending, together with the records, files and papers pertaining to such chancery jurisdiction, without regard to the amount in controversy, are hereby transferred to the Circuit Court of the respective counties." And that "All liens which may have been credited, and all rights which may have accrued under and by virtue of any chancery proceedings in said courts, are hereby transferred to the said Circuit Court, to be there preserved and in force in the same manner as if original jurisdiction thereof had been taken by said Circuit Court."

It is contended that the transfer of the cause under that act, and the subsequent confirmance of the sale by the special master, must be held to relate back to and render valid the sale, and that the proceedings are *res adjudicata* and can not be attacked in the manner sought. It would seem to be a sufficient answer to that contention that the County Court of DeKalb County was not, by the act of 1863, invested with chancery jurisdiction, and that the enabling act of 1873 did not contemplate the statutory proceedings instituted by Ellwood & Co. against Wilcox. But if it be conceded that the enabling act did include such proceedings, an insurmountable objection to that contention is, that the sale was made after the repeal of the act of 1863, and before the passage of the enabling act. By the repealing act of 1872, the proceedings ceased to have vitality. There was no power to execute the decree. There was no such officer as special master of the County Court, and when the person who had held that office before it was legislated out of existence assumed to act, his acts were absolutely void. If the enabling act of 1873 had the effect to revive mechanics' lien proceedings incomplete in the County Court, when its jurisdiction was taken away, then only would the Circuit Court be authorized to take up the proceedings at the stage where they were at the time of the repeal. The decree could be executed only by an officer of the Circuit Court.

If the sale were void, as we hold, it follows as a logical sequence, that the subsequent redemption and sale under the Warren judgment was void.

The redemption could give no vitality to the previous sale made, as it was by a person having no authority whatever, and under a decree which had at the time no vitality. *Mulvey v. Carpenter et al.*, 78 Ill. 580.

It is insisted, however, that the Warren judgment was Boynton's judgment, procured by him in the name of Warren; that Boynton furnished the redemption money, and ordered the sale which was made by the sheriff to Wild, and that by reason of his action in that regard, he recognized the special master's sale as valid, and is estopped from saying that sale was void. The case lacks several of the essential elements of an estoppel. In the first place, the proof is not clear and convincing that Boynton procured the judgment and redemption and ordered the sale. And, if it be conceded that he did, it does not appear that he acted with a fraudulent purpose, or that Pierce and Dean have lost anything thereby. The entire proceedings in the County and Circuit Courts were preserved in public records open to inspection.

Applying the law, they knew the sale by Charles Kellmum was void, and that every step taken after the rendering of the decree was of no effect. How were they deceived? Certainly by no concealment of fact or fraud on the part of Boynton. He may, if regarded as the author of the first redemption, have labored under a mistaken notion of the law, and considered the sale as legal. It is a novel idea in the law of estoppel, that the doctrine should be applied to a person who has been guilty of no fraud, simply because under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all. As we understand the doctrine of estoppel *in pais*, it is based upon a fraudulent purpose and a fraudulent result. Before it can be invoked to the aid of a litigant, it must appear that the person against whom it is invoked has by his words or conduct caused him to believe in the existence of a certain state of things, and induced him to act upon that belief. If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party

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can not say he has been deceived thereby, and is entitled to an application of the rule, but will be considered as having acted upon his own judgment solely:

The essential elements are, misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance upon his part in acting upon the representations. 2 Story's Equity Jurisprudence, 1543; Davidson v. Young, 38 Ill. 152; First Nat. Bank of Quincy v. Ricker, 71 Ill. 439; Dinet v. Eilert, 13 Brad. 99; Herman on Estoppel, 969.

Upon the title of appellant the sale of December 14, 1872, and the subsequent sale on redemption were clouds, and the contemplated sale on the Pierce and Dean execution would, if completed, be a further cloud. He was entitled to the relief sought, and the Circuit Court should have granted it. The decree will therefore be reversed, and the cause remanded with directions to the Circuit Court to enter a decree in accordance with the views expressed in this opinion.

Farmers' and Mechanics' Bank et al. v. Spear.

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156s 555

1. *Creditor's Bill—Judgment by Confession—Rights of Creditors.*—S. having become surety on a promissory note for T. & McL., and having guaranteed the payment of accounts due by them to different persons, for the purpose of indemnifying himself for what he might have to pay, took a judgment note from them and caused judgment to be entered upon it. Upon this judgment an execution was issued, which, being returned in part unsatisfied, he filed a creditor's bill. Upon the question being raised as to whether the judgment was such as would enable him to maintain his bill, *it was held* that it was not fraudulent, simply because he did not pay the debts for which he was surety until after his judgment was entered, and as defendants in the creditor's bill had not been misled, injured or deferred in any way on account of it, the bill would lie.

2. *Statute of Frauds—Promise to Pay the Debt of a Third Person.*—S. signed a promissory note payable to F. & M. Bank as surety for T. & McL., afterward entering into a verbal agreement with the bank that it should pay him one-half of any loss he might sustain through

failure of T. & McL. to pay said note and certain other debts for which he was surety for them. *It was held* that the agreement was within the statute of frauds and void.

3. *Statute of Frauds—Special Promise to Answer for the Miscarriage of a Third Person—Consideration.*—A consideration for a promise to answer for the miscarriage of a third person, does not obviate the necessity of a writing, or make a promise original which is in its nature collateral.

4. *Insolvency—Unlawful Preferences—Judgment Notes and Attorney's Fees.*—The J. V. F. Co. had two notes of T. & McL., which provided for reasonable attorney's fees if not paid when due, and knowing the said T. & McL. to be insolvent, it voluntarily surrendered said notes, taking from them a new judgment note in lieu thereof, which provided for an attorney fee of \$250. *It was held* that the provision for the attorney fees constituted an unlawful preference.

Memorandum.—Creditor's bill. Appeal from a decree rendered by the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Circuit Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANTS' BRIEF, GEO. W. THOMPSON AND FORREST F. COOKE, ATTORNEYS.

A judgment by confession must be founded upon a pre-existing indebtedness *bona fide* due, and a judgment simply founded on a possible contingent liability is a fraud and must be treated as a nullity. *Sprague v. Noble*, 3 Brad. 522.

It is only for a debt *bona fide* due, that a person may confess judgment. *Hulse v. Mershon*, 125 Ill. 52.

The statute of frauds is a perfect defense to the suit, as far as the F. & M. Bank is concerned. Statute Ill., Chap. 59, title, Frauds and Perjuries, Sec. 1; 1 Brandt on Suretyship (2d Ed.) Secs. 59, 61, 74, 76; *Murto v. McKnight*, 28 Ill. App. 238; *Eddy v. Roberts*, 17 Ill. 505; *Hardman v. Bradley*, 85 Ill. 162; *Tileston v. Nettleton*, 6 Pick. 509; *First Nat. Bank v. Bennett*, 33 Mich. 520.

The president of a bank has no authority to make the agreement claimed. It is not within the powers of a bank or its president and therefore a nullity. *First Nat. Bank v. Bennett*, 33 Mich. 520; *Morse on Banking*, 134; *Wyman v.*

Farmers' & Mechanics' Bank v. Spear.

Hallowell Bank, 14 Mass. 61; Salem Bank v. Gloucester Bank, 17 Mass. 29; Bank v. Dunn, 6 Pet. 59.

APPELLEE'S BRIEF, EDGAR A. BANCROFT AND E. P. WILLIAMS,
ATTORNEYS.

The contract between the bank and Spear was not a collateral, but an independent contract, founded upon a new and independent consideration, passing from Spear to the bank, to wit, the mutual promise of Spear to the bank, and of the bank to Spear, to act together and for mutual benefit, and share equally the gain and risk of all loss consequent thereon. The promise of each to the other, was a sufficient consideration for the promise of the other. "A promise for a promise is a good consideration everywhere." Funk v. Hough, 29 Ill. 145.

The promise of the one is the consideration for the promise of the other. Bishop on Contracts (enlarged edition), 76.

a. The main question for inquiry, under the statute, is whether the promise is an original and independent one, or subsidiary, collateral to and depending upon the debt or liability of another.

b. In this case the undertaking is not collateral, but is rightly counted on as an original undertaking of the defendant, the F. & M. Bank itself. Clifford v. Luhring, 69 Ill. 401; 2 Parsons on Contracts, 305.

OPINION OF THE COURT, CARTWRIGHT, J.

In this case appellee filed a bill against Farmers' & Mechanics' Bank and John V. Farwell Co., appellants, and I. P. Norton, to compel the defendants to pay to him attorney's fees included in judgment notes taken by them from Thompson & McLean, when the makers were insolvent, and afterward reduced to judgment and collected, and to enforce an alleged verbal agreement between complainant and the president of said bank, that the bank should pay complainant one-half of any loss he might sustain through failure to collect from said Thompson & McLean certain debts due from them.

The bill alleged that complainant recovered a judgment

in vacation, January 21, 1891, against Thompson & McLean, for \$4,200, damages and costs, on which execution was issued the same day and returned June 15, 1891, satisfied as to \$624.91, and unsatisfied as to the balance, which judgment remained in full force; that Thompson & McLean had been insolvent since January 1, 1891; that on January 19, 1891, they gave John V. Farwell Co. a judgment note for \$2,473.83 and \$250 attorney's fee, upon which the payee, knowing the insolvency, entered judgment, January 21, 1891, and collected the same out of the property of said insolvents; that on January 20, 1891, said insolvents gave I. P. Norton a judgment note for \$220, and \$25 attorney's fee, on which judgment was entered January 21, 1891, which was collected in full; that on January 21, 1891, said insolvents gave to the bank a judgment note for \$2,043.67 and \$102.18 attorney's fee, on which judgment was entered the same day and which was collected in full; that said Thompson & McLean, on December 1, 1890, and prior thereto, were indebted to complainant about \$4,000, on account of his being surety for them with one Johnson, as Johnson, Thompson & McLean, to said bank, John V. Farwell Co., and Locke, Hulet & Co., and were also indebted to said bank on other notes on which complainant was not surety, and on which the bank had no security; that about January 17, 1891, it was agreed between complainant and the bank that nothing should be done by either toward collecting said indebtedness until Thompson & McLean should complete an inventory of stock then being made, and that they would work together in protecting their claims, and in case of loss on either of said claims, would bear it equally; that the bank disregarded its agreement, and obtained said note and judgment covering only the unsecured debt to it, and sued Johnson, Thompson & McLean and complainant on the note on which complainant was surety, then amounting to \$3,671.89; that complainant had been compelled to pay Locke, Hulet & Co. \$237.60 on his said liability as surety for them, and that complainant's total loss, after deducting the amount collected on execution and the profit realized by him on goods purchased at sheriff's sale, amounted to \$2,400, one-half of

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which the bank should pay under said agreement. The prayer of the bill was that the defendants should be decreed to pay complainant said attorney's fees and that the bank should be decreed to pay to him one-half of his said loss.

The bank in its answer denied the making of the alleged agreement, as well as the authority of any officer of the bank to make an agreement of that kind, and pleaded the statute of frauds as a defense to such alleged agreement.

The answer of John V. Farwell Co. denied any knowledge of January 19, 1891, of the insolvency of Thompson & McLean, and admitted the taking of the judgment note with attorney's fee, but averred that it was taken in renewal of previous notes, given when complainant represented the makers to be solvent which contained provisions for attorney's fees.

The court on a hearing of the cause found that the complainant was entitled to the relief prayed for, and referred the cause to the master to state the account and find the net loss of complainant because of his suretyship.

The master reported that complainant, as surety for Thompson & McLean, was compelled to pay the bank \$3,500, and Locke, Hulet & Co., \$237.80; that after crediting \$624.71 realized on execution, \$900 profit made on resale of goods, \$250 attorney's fee, to be paid back by John V. Farwell Co., and \$25 attorney's fee, to be paid back by Norton, the amount paid by complainant as such surety was \$1,938.86, and that there was due complainant from the bank under the agreement one-half of that sum, or \$969.43.

Objections and exceptions to said report were overruled, and the court decreed that John V. Farwell Co. pay complainant \$250; that I. P. Norton pay \$25, and that the bank pay \$969.43, and that on payment of said sum by the bank it should be subrogated to the rights of complainant to the extent of one-half or the indebtedness due him from Johnson, Thompson & McLean. From this decree the Farmers' and Mechanics' Bank and John V. Farwell Co. appealed.

The evidence showed that at the time complainant took his note and entered judgment thereon, he was surety on the

note for \$3,500 to the bank, and had guaranteed the account of Locke, Hulet & Co. for \$237.86, and was also on a written guaranty to the amount of \$1,000, covering part of the indebtedness included in the judgment of John V. Farwell Co., and that Thompson & McLean were insolvent, but he had not then paid any of said liabilities. The judgment note was given for the purpose of indemnifying him for what he would have to pay, and it was taken and judgment entered for that purpose. Before the hearing he paid the judgment on the \$3,500 note, amounting to \$3,976.66, and the account of \$237.80.

The first question raised is, whether the judgment of complainant was such a one as would enable him to maintain the bill. It is argued that it was fraudulent, because he did not pay the debts on which he was surety until after the judgment was entered, and that it was therefore void. The defendants were not misled, injured or defrauded in any way on account of that fact, and we think that it would not prevent him from maintaining the bill.

The alleged agreement by which the bank was to pay one-half of complainant's losses as surety for Thompson & McLean was claimed to have been made by the president of the bank. The fact of the promise being made was disputed, and the evidence on that question was conflicting; but if we assume that fact as proven, and also that it was within his powers as president, to bind the bank by such an agreement, the promise was within the statute of frauds. Thompson & McLean were the primary and principal debtors, and remained liable after the agreement exactly as before. Their relation as debtors remained unchanged by the agreement, and the debts were still to be paid by them. If they should discharge the obligation, neither of the parties to the agreement would have anything to pay. The agreement was only to pay in case they failed to do so. They are still liable to the complainant for what he had to pay, and this is recognized by the decree in the subrogation of the bank to the extent of one-half of the debt of Thompson & McLean. The agreement was merely

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a promise to answer to complainant for one-half of so much of Thompson & McLean's debt as they should fail to pay, and was within the statute. *Eddy v. Roberts*, 17 Ill. 505; *Murto v. McKnight*, 28 Ill. App. 238; *Waterman v. Reseter*, 45 Ill. App. 155.

It is contended that the contract in question was an original undertaking, entered into upon a new and valuable consideration, consisting of the mutual promises of the parties, and that therefore it was not within the statute; but the fact of a consideration for a promise, does not obviate the necessity of a writing, or make a promise original which is in its nature collateral. *Eddy v. Roberts*, *supra*.

In our judgment, the decree was erroneous, as far as the bank was concerned.

The John V. Farwell Co. had two notes of Thompson & McLean, upon which I. P. Norton was surety, one for \$779.14, and the other for \$780, which provided for reasonable attorneys' fees, if not paid when due, and these notes were surrendered, and the amounts included in the judgment note, to said company. No attorneys' fees had been earned, and there is not even any means of knowing how much reasonable attorneys' fees for collecting those notes might have been, or of separating them from the balance. The notes were voluntarily surrendered, and a judgment note was taken providing for an attorney's fee of \$250, when the makers were known to be insolvent, and such provision constituted an unlawful preference. *Hulse v. Mershon*, 125 Ill. 52.

That part of the decree requiring the appellant, John V. Farwell Co., to pay over said sum of \$250, is affirmed. The decree as against the appellant, Farmers' & Mechanics' Bank, is reversed. The cause is remanded, with directions to dismiss the bill as to said bank at complainant's cost, and to modify said decree as to costs accordingly, requiring complainant to pay the costs as to that branch of the case.

The appellant, John V. Farwell Co., and the appellee, each to pay one-half of the costs of this appeal.

Decree affirmed in part, reversed in part, and cause remanded with directions.

Hart v. Morgan.

1. *Jury—Findings Conclusive in Questions of Fact.*—Where the disputed questions of fact have been fairly presented to the jury, and they have not been led astray by defective instructions, or some other error of the trial court, their finding will not be disturbed unless it is apparent that they have been actuated by passion or prejudice, or labored under a misapprehension of the facts.

2. *Remittitur.*—Where a mistake has been made by a jury in computing interest upon a note in suit, the amount in excess of the true sum may be remitted in the Appellate Court.

Memorandum.—Suit on promissory note. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, A. D. 1893, and judgment modified. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, W. T. WHITING AND STEVENS & HORTON,
ATTORNEYS.

While this court recognizes the rule that jurors are judges of the facts and weight of evidence in all cases, yet the law has imposed upon the court the solemn and responsible duty to see that no injustice has been done by hasty action, passion or prejudice, or from any other cause on the part of the jury. *Mooney v. The People*, 111 Ill. 388; *C. R. I. & P. Ry. Co. v. Herring*, 57 Ill. 59; *Fox River Mfg. Co. v. Reeves*, 68 Ill. 403; *I. C. R. R. v. Chambers*, 71 Ill. 519; *Rix v. Stubblefield*, 12 Brad. 309; *C. & A. R. R. v. Barber*, 15 Brad. 630; *Booth v. Hynes*, 54 Ill. 363; *Southworth v. Hoag*, 42 Ill. 446; *Lockwood v. Onion*, 56 Ill. 506; *Chadwick v. McKee*, 18 Brad. 646; *Keaggy v. Hite*, 12 Ill. 99; *Thompson v. Fullinwider*, 5 Brad. 554; *Koester v. Esslinger*, 44 Ill. 476; *Hoobler v. Hoobler*, 128 Ill. 645; *A., T. & S. F. R. R. Co. v. Schneider*, 127 Ill. 144.

APPELLEE'S BRIEF, GEO. B. FOSTER, ATTORNEY.

Where the evidence is conflicting and irreconcilable, the verdict will not be set aside on appeal or error as against

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the weight of evidence, unless it is so contrary to the evidence as to warrant the inference that it is the result of passion, or prejudice, or misunderstanding. *Robinson v. Parish*, 62 Ill. 130; *Kincaid v. Turner*, 2 Gilman, 618; *Boyle v. Levings*, 24 Ill. 223; *DeClerq v. Mungin*, 46 Ill. 112; *Miller v. Balthasser*, 78 Ill. 302; *Cohen v. Schick*, 6 Brad. 280; *Armour v. McFadden*, 9 Brad. 508; *Lowe v. Ravens*, 21 Ill. App. 630.

The verdict can not be set aside as against the weight of evidence, where the evidence is conflicting, inconclusive and irreconcilable, there being nothing to show improper motives; the weight of the evidence is for the jury. *Pulliam v. Ogle*, 27 Ill. 189; *White v. Claves*, 32 Ill. 325; *Woodstock Bank v. Mansfield*, 48 Ill. 494; *Dunning v. Fitch*, 66 Ill. 51; *Simons v. Waldron*, 70 Ill. 281; *P. D. & E. Ry. Co. v. Babbs*, 23 Ill. App. 454.

The court goes further: "The verdict can not be set aside as against the weight of evidence where the evidence is conflicting, and, by a fair and reasonable intendment, warrants the finding, although the preponderance appears to be the other way." *Lowry v. Orr*, 1 Gilman, 70; *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338; *McKichan v. McBean*, 45 Ill. 228; *O'Brien v. Palmer*, 49 Ill. 72; *Shevalier v. Seager*, 121 Ill. 564.

Where the evidence is conflicting and irreconcilable it is for the jury to weigh it and reject such as it thinks unworthy of belief. *Brown v. Berry*, 47 Ill. 175.

OPINION OF THE COURT, HARKER, P. J.

On the 18th of September, 1890, appellee caused judgment to be entered in vacation for \$860.40 against appellant, on a note for \$800 and interest, dated May 11, 1889, and purporting to have been made by appellant to appellee. At the October term, 1890, of the Circuit Court, on motion of appellant, the court set aside the judgment and permitted appellant to interpose a defense. The cause was not tried at that term and when called at the next subsequent term, it was discovered that the papers, together with the note,

were misplaced and could not be found. It was then stipulated that copies should be filed and the cause tried without prejudice to either party. A trial by a jury was had, resulting in a verdict in favor of appellee for \$1,604, upon which the court, after overruling a motion for a new trial, entered judgment.

The defense interposed was, that the note was a forgery. Appellee and his son testified that he loaned \$800 to appellant on the day on which the note is dated and that the note was executed for the loan. Appellant denied the execution of the note, and denied that he borrowed the money. The other evidence heard, related to the financial circumstances of the parties, the ability of appellees to furnish that amount of money, the needs of appellant to borrow, and an alibi on the day of the date of the note.

None of the evidence except that upon the execution of the note was of a conclusive character. Nor was there a preponderance in appellant's favor. The jury and the court below, were better able to judge of the credibility of the witnesses than we are. In a case where the disputed questions of fact have been fairly presented to the jury and they have not been led astray by a defective instruction or some other error of the trial court, their finding will not be disturbed by this court unless it is apparent that they have been actuated by passion or prejudice, or labored under a misapprehension of the facts. Where the evidence is conflicting it is their peculiar province to reconcile it as far as possible and determine where the truth is.

We see no error in the instructions.

A mistake was made by the jury in computing interest on the note. The verdict should have been for \$999.14; but appellee has remitted in this court \$4.86.

Judgment will therefore be affirmed for the amount of \$999.14 and judgment on appellee for the costs of this court.

Moller v. Barrett.

Moller v. Barrett.

1. *Forcible Detainer—Service of Notice.*—The return of a constable indorsed on a notice, in forcible detainer, to terminate a tenancy by the month, showing service of the notice, is *prima facie* evidence of the facts therein stated under Sec. 11, Chap. 80, of the Revised Statutes.

Memorandum.—Action for forcible detainer. Appeal from the County Court of La Salle County; the Hon. BENJAMIN F. LINCOLN, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

Form of the notice and return:

“TO N. MOLLER:

“Sir: You will please take notice that you are hereby notified to quit and deliver up, on the 31st day of July, A. D. 1892, the possession of the premises which you now hold of me, situate in the city of Mendota, county of La Salle and State of Illinois, more particularly described as follows: Lots 8 and 9, in block 53, West's addition to Mendota; being at the end of the month of your tenancy.

“WILLIAM BARRETT, *Landlord.*”

“June 28, 1892.

Service of said notice was made by Ed. Coleman, a constable, and a return thereon made by him as to the manner of the service. Said return is as follows:

“STATE OF ILLINOIS,)
La Salle County.) ss.

“I have duly served the within notice on the within named N. Moller by reading the same to him and delivering to him a true copy thereof this 29th day of June, A. D. 1892.

“ED. COLEMAN, *Constable.*

“Fees.....\$.35

“Service... .10

“\$.45”

C. P. GARDNER, attorney for appellant.

MOLONEY, BURKE & MADDEN, attorneys for appellee.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellee brought this action in forcible detainer, and recovered before the justice, and also in the County Court on appeal.

The only question in the case is concerning the sufficiency of the proof of service of a notice to terminate a tenancy by the month. The service of the notice was proven by the return of a constable of La Salle County, indorsed on the notice. This return was made *prima facie* evidence of the facts therein stated by the provision contained in section 11, chapter 80, Revised Statutes, for that purpose. The judgment will be affirmed.

Cleveland, C., C. and St. L. R. Co. v. Ducharme.

1. *Railroads—Liability for Gross Negligence.*—A horse was killed upon a railroad track at a place where it had no right to be, and where it would not have been but for the drunkenness and negligence of the owner's servant. It appeared that the owner had notice of his servant's drunkenness, and had been warned not to allow him to drive the horse. *It was held*, that a recovery could not be sustained, unless the servants of the railroad company, operating the train, were guilty of gross negligence.

2. *Instructions—Negligence of the Plaintiff as a Defense.*—In an action against a railroad company for killing a horse it appeared that the owner intrusted the horse to a drunken servant, and it ran away, getting upon the track where it was killed; the court instructed the jury that before the defense of negligence on the part of the plaintiff could prevail it should appear that such negligence was the natural and proximate cause of the injury, and must be contemporaneous in point of time. *It was held*, erroneous, as it excluded from the jury the negligent act of the drunken driver.

Memorandum.—Action for killing domestic animals. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, T. P. BONFIELD, ATTORNEY.

It is not the law that plaintiff's negligence is not contributory because it was not direct. No such limitation has been recognized by the courts. If the negligence of the plaintiff

directly or indirectly contributed to the injury, the plaintiff can not recover. *Button v. R. R. Co.*, 18 N. Y. 248; *Runyon v. Cent. R. R.*, 1 Dutch. N. J. 556; *Telfer v. R. R. Co.*, N. J. L. 188; *N. J. Ex. Co. v. Nichols*, 33 N. J. L. 439; *Aurora R. R. Co. v. Grimes*, 13 Ill. 587; *C. & A. R. R. v. Gretzner*, 46 Ill. 75.

APPELLEE'S BRIEF, JOHN SMALL AND W. G. BROOKS,
ATTORNEYS.

The fact that the driver was drunk, cuts no figure. If he was drunk that is remote, as his drunkenness could not necessarily and proximately contribute to the injury. And however negligent the driver might have been, it does not relieve appellant from the duty of using due care to prevent injury. *Chicago W. Div. R. R. Co. v. Ryan*, 131 Ill. 474; *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *Werner v. Citizens' R. R. Co.*, 81 Mo. 368.

The plaintiff may recover, though his own negligence exposed him to the risk of injury, if the defendant failed to use ordinary care to avoid injuring him, after becoming aware of plaintiff's danger. *Shearman & Redfield on Negligence*, third edition, p. 43, Sec. 36.

OPINION OF THE COURT, HARKER, P. J.

On the 9th of November, 1892, appellee's hired man, one Aleck Campbell, was engaged in hauling hay from appellee's farm to St. Anne, a station on appellant's railroad. About five o'clock in the evening, Campbell, while in an intoxicated condition, started from the station with the team of appellee, driving in a trot.

He soon fell from the wagon and the team ran away. They ran into a cattle guard on appellant's railroad and became fastened there. Campbell succeeded in extricating one of the horses, but before he, with the assistance of others, was able to extricate the other one, it was run over by a passing freight train and killed. Appellee sued the company for the value of the horse and recovered judgment for one hundred dollars.

It is plain from the evidence, that the horse was killed at a place where it had no right to be, and where it would not have been but for the drunkenness and negligence of appellee's servant. It appears also, that appellee was warned of the servant's drunken condition, and told not to allow him to drive the team. It follows that a recovery could not be sustained unless it appear that the servants of appellant operating the train, were guilty of gross negligence.

It appears that while Campbell and two men, whom he had called to his assistance, were endeavoring to extricate the horse, they discovered the freight train approaching, about four miles distant. One of the men procured a lantern from his house, thirty-five or forty rods away, tied a red cotton handkerchief around it and ran down the track to signal the train. As soon as the engineer discovered the signal he whistled for brakes. The brakes were applied, but the train did not stop before reaching the horse. When signaled, the train was moving at the rate of twenty-five miles per hour.

There is a sharp conflict in the testimony as to the distance the engine was from the horse when signaled. According to the testimony of appellee's witnesses the distance was from one hundred to one hundred and twenty rods, while the testimony of the persons operating the train, shows that it was from thirty to forty rods. The engineer testified that as soon as he saw the danger signal he whistled down brakes, applied the air brake on his engine and that every reasonable effort was made to stop the train, but that it was impossible for him to do so before reaching the horse. If his testimony is true, then there is no right of recovery. He was strongly corroborated by the fireman, conductor, two brakemen and a section foreman. In view of the conflict, much must depend upon the reasonableness of the various statements given and the circumstances surrounding the transaction. It is not credible that an engineer, operating a train in the night time, at the rapid rate of twenty-five miles per hour, would dash recklessly on to an obstruction that he knew not the nature of, but against which he

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was warned by the flashing of a danger signal before him, thereby endangering his own life and the lives of those on the train with him. Men do not so readily encounter danger. We are clearly of the opinion that the testimony of appellant's witnesses was entitled to greater credit than the contravening testimony on this branch of the case.

The court instructed the jury, that before the defense of negligence on the part of the plaintiff could prevail, it should appear that such negligence was the natural and proximate cause of the injury and must be contemporaneous in point of time. Such is not the law. Under such instruction it is difficult to see how the negligent act of the drunken driver in falling off the wagon and allowing the team to run away, had any bearing with the jury.

For error in the instructions and because the verdict of the jury was against the evidence, the judgment should be reversed. Judgment reversed and cause remanded.

Danforth v. Clary.

1. *Estoppel—Liability of Property to be Sold on Execution.*—C. sold to D. a quantity of corn, and agreed to deliver it at a place named. Before the delivery, and while it was in C.'s possession, it was levied upon by one of his creditors and allowed to be sold. After the title had thus passed out of C., he wrongfully delivered the corn to D., and the purchasers at the sale replevied it from him. C. had notice of the replevin suit, and had an opportunity to defend it, but he failed to do so. *It was held* that he was estopped to deny that the corn, while under his control, was liable to execution on a judgment against him.

2. *Warranty—Title Between Vendor and Vendee—Execution Creditors.*—If a person sells a quantity of corn to be delivered when required to do so, and while the corn is in his possession, although the title may have passed, as between vendor and vendee, to the purchaser, if the vendor allows the title to pass from him by a sale under an execution against him, his warranty fails, and he can not recover for the price of the corn.

Memorandum.—Action of assumpsit. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, A. D. 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, J. W. DOUGHERTY AND MORRIS & HOOPER,
ATTORNEYS.

Title to personal property does not pass to the purchaser until the purchase is completed, and nothing remains to be done under the agreement. *Frost v. Woodruff*, 54 Ill. 157; *Schneider v. Westerman*, 25 Ill. 514; *Callaghan v. Myers*, 89 Ill. 570.

C. H. PAYSON, attorney for appellee.

OPINION OF THE COURT, LACEY, J.

This was an action in assumpsit, brought by appellee against appellant, returnable to the November term, 1890, of the Circuit Court of Iroquois County, to recover the sum of \$800, which appellee claims due him from appellant for 2,000 bushels of corn, bargained and sold to appellant on the 16th day of December, 1885.

The case was tried at the October term, 1890, and a verdict was then returned in favor of appellee and judgment rendered upon the verdict and from which judgment an appeal was taken to this court and the judgment of the court below reversed and the cause remanded.

The opinion of the court will be found reported in 41 Ill. App. 655, to which we refer for a full statement of facts.

Since then a new trial has been had in the Circuit Court, and verdict and judgment in favor of appellees for \$500, from which last judgment this appeal is taken.

The suit was, as above stated, based on a sale of corn by appellee to appellant, and the defense was that the title failed by reason of appellee's creditors levying on the corn, and that it was sold while it was still in his possession, and that afterward the corn was wrongfully delivered by appellee to appellant, after the title had passed out of appellee; that the purchaser replevied it from appellant and after trial of the rights of property, held it.

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The evidence in the present record, in all its essential features, is the same as when the case was in this court on former appeal, and what we said in the opinion rendered on the former hearing, we approve here. We said in that opinion, that we were satisfied from the evidence "the bill of sale was intended as a security and that appellee was to be credited with the proceeds of the corn when fully paid."

If the bill of sale was intended as absolute, and the corn was delivered to appellant, as contended for by appellee, the action of appellee in allowing his boys to haul away 300 to 400 bushels of the corn was little, if any, short of larceny, which we would be unwilling to impute to appellee. The judgment is for \$500, too much by \$100, on the appellee's own theory. According to appellee's evidence he delivered to appellant what he set down at 1,000 bushels of corn, which at forty cents per bushel would only amount to \$400, unless appellee be allowed for what was taken by himself and family from the cribs and delivered and sold to other parties.

It seems to us that appellee's claim is a most inequitable one. He claims to have sold and delivered his corn to appellant for forty cents per bushel. While the delivery of it is incomplete, at least as to judgment creditors and parties without notice, it is levied on for his own debts and sold to pay off an execution against him, and his debts are also satisfied to the amount of the execution, about \$235.06. Now he seeks to recover in addition the full price of the corn at nearly double what it was worth when the pretended sale took place.

Admitting that the sale was absolute, and as between the appellee and appellant the title passed, yet the corn remained in the absolute possession of appellee, so that it was liable to be seized on executions against him, and the property, as to his creditors, treated as absolutely his, even against the claim of the appellant. Appellee was a witness in the replevin suit of Sheldon and McDill, and the plaintiff's title was sustained, which they derived through appellee himself by virtue of the execution sale against him. Appellee, according to his

own claim, had agreed to warrant the title to the corn. He had an opportunity by notice to defend the replevin suit and if there was any defense to it to show it, but he did nothing of the kind, and appellant was defeated and lost the corn. Appellee is therefore estopped to deny that the property, while in his crib and under his control, was liable to execution on judgments against him. This point must then be settled, that if a sale of the corn was contemplated and a delivery attempted, it was not complete as against execution creditors of appellee. It was not the appellant's fault that executions against appellee seized and took the property. The appellee was in fault in allowing such a thing to be done. Admitting the title as to appellee had passed to appellant by the sale, it had not done so as against him and his execution creditors. His warranty should then be held to cover, not only any defect in the title at the time, but everything that might impair it on account of appellee's fault before delivery at Ashkum as he agreed.

Further, appellee was grossly negligent in not posting the notices on the cribs that he promised to do, that the corn was the property of appellant. When the case was here before we said: "Appellee had agreed to deliver the corn at Ashkum when required so to do. He made no delivery of the corn except what he hauled to Larson's, and that had been sold for his debt and it was no longer in his power to make an effectual delivery."

We adhere to this opinion and hold, that if appellee, while the corn was in his possession, although the title may have passed as between himself and appellant, allowed the title to pass from him by sale under executions against him, that his warranty failed and he can not recover for the price of the corn. The judgment of the court below is therefore reversed.

Dionne v. Matzenbaugh.

Dionne et al. v. Matzenbaugh.

1. *Judgment upon Confession—Motion to Vacate.*—Where a notice was made to vacate a judgment, entered by confession, under a power of attorney, attached to a promissory note, it was shown by affidavits, that the only consideration was an agreement by the payee with the makers, not to prosecute a son of one of the makers for forgery. *It was held*, that if the fact shown were true, it would render the note void, and was sufficient ground for granting the motion.

Memorandum.—Action on a promissory note. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANTS' BRIEF, KAY & KAY AND C. W. RAYMOND,
ATTORNEYS.

The equitable jurisdiction to set aside judgments entered in vacation by confession, should be liberally exercised. It is necessary that courts of law should possess and liberally exercise that jurisdiction. *Lake v. Cook*, 15 Ill. 353; *Wyman v. Yeomans*, 84 Ill. 403. Where it is doubtful whether the plaintiff is entitled to judgment, an issue should be formed to try the defense. *Lake v. Cook*, 15 Ill. 353; *Condon v. Besse*, 86 Ill. 159; *Heeney v. Alcock*, 9 Brad. 431.

A judgment confessed may be opened because the note was given to compound a felony. *Bredin's Appeal*, 92 Pa. St. 241; 37 Am. Dec. 677; *Parker v. Enslow*, 102 Ill. 272; *Buck v. First Nat. Bk. of Paw Paw*, 27 Mich. 293; Am. Rep. 189.

Under the common law it was illegal, where the party robbed not only knew the felon, but also took his goods again, or other amends, upon agreement not to prosecute. This was called theft bote, or compounding a felony. It made a man an accessory. 4 Blackstone's Com. 133.

Compounding a felony is the act of a party immediately aggrieved, who agrees with the thief, or other felon, that he

will not prosecute him on condition that he return to him the stolen goods, or who takes a reward not to prosecute. Am. and Eng. Ency. of Law, Vol. 3, page 399.

The bare taking a man's own without favor to the thief is no offense. Bothwell v. Brown, 51 Ill. 234; Taylor v. Cottrell, 16 Ill. 93.

The public always has an interest in the fair trial of causes, so that notes in furtherance of agreements to suppress testimony are void. Swan v. Chandler, 8 B. Mon. (Ky.) 97; Hoyt v. Macon, 2 Col. 502.

Where any part of the consideration of a note is the compounding of a felony, or the suppression of evidence, it can not be enforced. It is contrary to public policy. The money for which the note was given may be actually due the payee, but if the consideration for the note is even in part, the abandonment or prevention of criminal proceedings, the instrument is illegal and void. Godwin v. Crowell, 56 Ga. 566; Taylor v. Jaques, 106 Mass. 291; Buck v. First National Bank, 27 Mich. 293; Am. and Eng. Ency. Vol. 3, 403; Woodruff v. Hinman, 11 Vt. 592; Cameron v. McFarland, 2 Car. Law Repos. 415 (N. Car.); Lindsay v. Smith, 78 N. C. 328; Rhodes v. Neal, 64 Ga. 704; Barron v. Tucker, 53 Vt. 338; Pearce v. Wilson, 111 Pa. St. 14.

APPELLEE'S BRIEF, C. H. PAYSON, ATTORNEY.

Whoever takes money or other reward, or promise thereof, to compound any criminal offense, shall be fined in double the sum or value of the thing agreed for or taken; but no person shall be debarred from taking his goods or property from the thief or felon, or receiving compensation for the private injury occasioned by the commission of any such criminal offense. 1 Starr & C. Statutes, 766, par. 69; Ford v. Cratty, 52 Ill. 315; Bothwell v. Brown, 51 Ill. 234; Taylor v. Cottrell, 16 Ill. 93.

A person prosecuting another upon a charge of crime, may receive from the accused private satisfaction for his private injury, and the fact that he receives this while the prisoner is in confinement, *and forbears further prosecution*, does not,

Dionne v. Matzenbaugh.

of itself, render the transaction illegal. Schommer v. Farwell, 56 Ill. 542; Heaps v. Dunham, 95 Ill. 583.

OPINION OF THE COURT, LACEY, J.

This was a motion made in the Circuit Court by appellants, to open up a judgment in favor of appellee, against them, entered by confession, by virtue of a power of attorney attached to a promissory note, given by appellants to appellee, dated November 12, 1891, for \$376, due December 1, 1892, with six per cent interest per annum, from date, based on the affidavit of the appellants, showing that the sole and only consideration of the note was an agreement by appellee, with them, not to prosecute appellant Siliana's son David, for the crime of forgery of a promissory note, signed by himself, payable to appellee for money loaned, for \$300, to which he had forged the names of John Baron and John Euchner as sureties, dated January 12, 1888, due in ninety days, with eight per cent interest, and the destruction of the note. In fact, the only consideration of the note was the compounding of a felony. It is true, there were counter affidavits filed, showing that the consideration of the note was as security for David, the son of appellant Siliana, to secure his note, to which the forged names were attached.

But the court could not try such issue on affidavits. If the affidavit of the appellant showed a *prima facie* case of a good defense, as here, it was the duty of the court to open up the judgment and allow such defense to be made, and the issue to be tried by a jury.

It is insisted that the affidavits failed to show a good defense, or that the consideration of the note was the compounding of a felony. But we think it does. It shows a state of facts, if true, that would void the note. Haltham v. Kuntz, 17 Brad. 434. This case is not like and is distinguished from, the one of Ford et al. v. Crotty, 52 Ill. 315. Here, as in the case of Haltham v. Kuntz, *supra*, the appellants were not the makers of the forged note. As said in the last cited case, the indebtedness of the principal

in the forged note "would be a sufficient consideration to support a promise, in writing, by appellants to appellee, to pay the debt," and in absence of proof to the contrary, the presumption would be that such indebtedness was the real consideration for the promise; but here all parties agree that the promise was in consideration that the plaintiff would not "prosecute the criminal charge against H. R. Kuntz."

In the case at bar, the affidavit of appellants shows that the consideration for their signatures to the note in question was the agreement not to prosecute David Saindore for his crime of forgery, who was the son of the appellant Siliana by her former husband.

The court erred in not granting the motion and in not opening up the judgment and allowing the defense. The judgment of the court below is therefore reversed and the cause remanded.

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Hayes v. Village of Dwight.

1. *Watercourses.—Pollution of—Nuisances.*—The pollution of water in a stream, so as to render it unfit for domestic use or for the watering of stock, is a sufficient ground for equitable interference.

2. *Nuisances—Pollution of Streams—Cities and Villages.*—An incorporated city or village has no more right than an individual, to render corrupt and unwholesome, a stream of water. Its duty to prevent a nuisance to its citizens by taking care of its sewage, gives it no right to create one, as to others, by the pollution of a stream in which the latter have rights.

3. *Injunctions—Watercourses—Owner of Lands upon a Stream.*—An owner of land upon a stream below a village, and into which the village attempts to discharge its sewers, is entitled to an injunction against irreparable injury by the outflow of sewage, and this is so, even where the stream in question is not a constantly flowing stream.

4. *Nuisances—Statutory Definition—Running Streams.*—To corrupt or render impure the water of any spring, river, stream, pond or lake to the injury or prejudice of others, is declared to be a nuisance by section 221 of chapter 38, R. S. Ill. There is no such limit as that of a constantly running stream.

5. *Nuisances—Chancery Jurisdiction—Trials at Law.*—The rule that before a court of equity will grant preventive relief against a threatened

Hayes v. Village of Dwight.

nuisance, the question of whether the thing is a nuisance must first be determined by a jury at law, or in special cases by a jury in an issue directed out of chancery, applies to cases only in which the thing threatened is not necessarily a nuisance, and not to cases where the thing threatened is a nuisance *per se*, or where its contemplated use will necessarily make it a nuisance.

6. *Estoppel—Easements Created by Deed or Prescription.*—The owner of land upon a stream below a village, when the citizens were agitating the question of sewage at a public meeting, was called upon for a speech and was represented as stating that he was willing that the sewage should be discharged into the stream provided a sufficient flow of water was had to keep the sewage moving. When applied to for a deed giving the village the right, he refused. *It was held*, that his alleged consent was simply an oral license, revocable at any time. The right was in the nature of an easement, which can not exist except by deed or prescription.

Memorandum.—Injunction to restrain a nuisance. Appeal from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, A. D. 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, REEVES & BOYS, ATTORNEYS.

The pollution of streams by municipalities and public bodies in charge of sewage and drainage, has occasioned frequent exercise of the preventive powers of equity. Upon principle a public body has no more right at common law than a private person. Its duty to prevent public nuisances by taking care of the sewage or drainage of a district gives it no right to create another nuisance by the pollution of a stream. Any pollution of a stream by a public body, in taking care of sewage, is therefore a nuisance unless expressly authorized, and is liable to injunction. Gould on Waters, Secs. 544, 545, 546; Wood on Nuisances, Secs. 683, 684, 685, 686, 689; Attorney-General v. Leeds, 5 L. R. Ch. App. 589; High on Injunctions, Sec. 810; Merrifield v. Lombard, 13 Allen 16; Wahle v. Reinbach, 76 Ill. 322.

The power of a court of chancery to restrain a threatened nuisance has been clearly and positively affirmed by

our Supreme Court, in the following cases, to-wit: Dunning v. Aurora, 40 Ill. 481; Bliss v. Kennedy, 43 Ill. 69; Lake View v. Letz, 44 Ill. 81; Hotz v. Hoyt, 135 Ill. 388.

Upon the question of consent, if it is the claim of defendant that complainant consented to allow the defendant to run a drain or sewer across his premises, or to permit it, this right would be an easement upon the land of complainant. And an easement can not be obtained except by deed or prescription. An oral license is revocable at any time. And in support of this we cite the following cases: Wisemen v. Lucksinger, 84 N. Y. 31; Olmsted v. Dennis, 77 N. Y. 378; Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72; Cook v. Streans, 11 Mass. 533; Stevens v. Stevens, 11 Met. 251; Ex Parte Coburn, 1 Cow. 568; Munford v. Whitney, 15 Wend. 384; Post v. Pearsall, 22 Wend. 425; Banks v. Am. Tract So., 4 Sandf. Ch. (N. Y.) 438; Forbes v. Bolenseifer, 74 Ill. 183; Morse v. Copeland, 2 Gray 302; Robinson v. Thrailkill, 110 Ind. 117; Thompson v. Gregory, 4 Johns. 81; Cobb v. Hampshire, 18 Pick. 340; Miller v. A. & S. Ry Co., 6 Hill 61; Kamphouse v. Gaffner, 73 Ill. 453; Tanner v. Volentine, 75 Ill. 624; St. Louis Stockyards Co. v. Wiggins Ferry Co., 112 Ill. 384; Simpson v. Commissioners, etc., 21 Ill. App. 67; Murray v. Gibson et al., 21 Ill. App. 488; Stoddard v. Filgur et al., 21 Ill. App. 560; Deyo v. Ferris, 22 Ill. App. 154; Totel v. Bonnefoy et al., 23 Ill. App. 55.

APPELLEE'S BRIEF, R. S. MCILDUFF AND GEO. W. PATTON,
ATTORNEYS.

"The question as to what is a nuisance is one peculiarly fitted for the investigation of a jury, and in an ordinary case, where the event of a suit in equity depends upon a legal right, the right must be ascertained in an action at law, before any relief can be granted in a court of equity." 2 Story's Eq. Juris., Sec. 925b.

"The cases to be found in the reports illustrative of the rules above stated are very numerous. Reference is made to the following: Eastman v. Company, 47 N. H. 71; Attorney-General v. Heishon, 18 N. J. Eq. 410; Shields v. Arndt,

Hayes v. Village of Dwight.

4 Id. 234; Hackensack Improvement Commission v. New Jersey Midland Ry. Co., 22 Id. 94; Wolcott v. Melick, 11 Id. 204; Goodall v. Crofton, 33 Ohio St. 271; Kennerty v. Etewan Phosphate Co., 17 S. C. 411; Clack v. White, 2 Swan 540; Fisk v. Wilber, 7 Barb. 395; White v. Forbes, Walker, (Mich.) 112; Hacke's Appeal, 101 Pa. St. 245; Washburn on Easements, (3d ed.) 700; Adams' Equity, 311.

When assent has been given to one by another to do an act, the natural and probable consequences of which are to produce a certain result, and the person to whom the assent is given goes on and expends money on the strength of the assent, and makes erections of a permanent character, while the consent does not give any interest in the land, and at law is revocable at any time, yet a court of equity will enforce it as an agreement to give the right, in a case of fraud or great hardship, or will generally enjoin a party from revoking it. Wood's Law of Nuisances, 2d Ed., p. 380, Sec. 360; Cook v. Pridgen, 45 Ga. 331.

Even if the assent or license involves the creation of an easement, yet if heavy sums of money have been expended on the faith of it, equity will not aid the licensor in consummating the fraud, but if invoked will decree a valid title. Houston v. Laffe, 46 N. H. 508; McKellip v. McIlhenny, 4 Watts, 317; 2 Eq. Cases Ab. 523.

"In cases where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation or by construing the license as an agreement to give the right and compelling a specific performance." Veghte et al. v. The Raritan Water Power Co., 19 N. J. Eq. 142; Brown v. Brown, 30 N. Y. 544.

Where great expense has been incurred on the faith of a parol license, such license operates as an equitable estoppel. Bridge Co. v. Bragg, 11 N. R. 102; Lefevre v. Lefevre, 4 S. & R. (Penn.) 241; Ricker v. Kelly, 1 Greenl. (Me.) 117; Hepburn v. McDowell, 17 S. & R. (Penn.) 383.

OPINION OF THE COURT, HARKER, P. J.

In the summer of 1892, the village of Dwight began the

construction of a system of sewers, planning said system so that the discharge of the sewage from the village would be into Gooseberry creek, a stream passing through the village and running in a northerly direction through the farm of appellant.

Appellant filed his bill to restrain the village from discharging its sewage into the creek, alleging that the creek was a running stream of living water, pure and good for stock; that he was using his farm as a stock farm; that he relied upon the waters of the creek for his stock; that he cut ice from the creek and stored it for the use of his family; that the discharge of the sewage into the creek above as contemplated by the village, would render the water unfit for use and would cause noxious odors to spread over his farm and place of residence, rendering the same unhealthful, and would cause to him irreparable injury. A temporary injunction was granted by the master in chancery as prayed for, and at the January term, 1893, of the Circuit Court, appellee having answered denying all the material allegations in the bill, a hearing was had resulting in a dissolution of the injunction and a dismissal of the bill.

The evidence shows that Dwight is a village of about 1,600 inhabitants; that appellant owns a stock farm of 212 acres about one mile north of the village, on which he has resided for several years, and that the stream into which the village proposes to empty its sewage flows through his farm for the distance of three-fourths of a mile, and is used by him for watering his stock and harvesting ice for domestic purposes. A large number of witnesses were examined as to the effect which a discharge of the sewage into the stream would have upon the water and there was some diversity of opinion among them. We do not care to discuss their testimony in detail but will say that the decided preponderance shows that the discharge of the village sewage as contemplated would pollute the water and render it unfit for use on appellant's farm. We are satisfied, also, from the evidence, that the sewage running through the

Hayes v. Village of Dwight.

stream, would fill the air about the premises and residence of appellant with unpleasant and unhealthful odors to such an extent as to render it a nuisance.

The pollution of water in a stream so as to render it unfit for domestic use or for the drink of stock by one who has the right to use it, is a sufficient ground for equitable interference. An incorporated city or village has no more right than an individual to render corrupt and unwholesome such water. Its duty to prevent a nuisance to its citizens by taking care of its sewage gives it no right to create to others a nuisance by the pollution of a stream in which the latter have rights.

An owner of land upon a stream like the one in question, below a village, is entitled to an injunction against irreparable injury by the outflow of sewage. Gould on Waters, Secs. 544, 545, 546; Wood on Nuisances, Secs. 683, 684, 685. High on Injunctions, Sec. 810.

In our opinion it does not militate against appellant's right to an injunction that Gooseberry creek is not a constantly running stream. The evidence shows that it is a running stream except in times of very dry weather, and that in those times sufficient water is left in pools and low places to water his stock. To our minds it appears that the nuisance would be greater with such a stream than it would be with a stream of a constant and never failing flow, because the sewage which had accumulated, would be left upon the premises instead of being washed away.

To corrupt or render impure the water of any spring, river, stream, pond or lake to the injury or prejudice of others, is declared a nuisance by our statute. 1 Starr & Curtis' Statutes, 815. There is no such limit as that of a constantly running stream.

It is contended by appellee that before appellant is entitled to an injunction, it must first be determined by a jury in a court of law that the emptying of the sewage into the creek constitutes a nuisance. Such, doubtless, was the view taken by the trial court, as the bill was dismissed "without prejudice to complainant's right at law." A long list of

authorities are cited, the most of them Illinois cases, in which the rule is laid down, that before a court of equity will grant preventive relief against a threatened nuisance, the question of whether the thing is a nuisance must first be determined by a jury at law, or in special cases by a jury on an issue directed out of chancery. The Illinois cases must be considered as referring to cases only in which the thing threatened is not necessarily a nuisance. As we read those cases, we do not understand our Supreme Court to hold a trial by jury to determine the question of nuisance necessary where the thing threatened is a nuisance *per se*, or where its contemplated use will necessarily make it a nuisance. In the case of *Wahle v. Reinbeck*, 76 Ill. 322, a case where the complainant sought to enjoin his neighbor from erecting a privy so close to his house and well that it would become injurious to the health and comfort of his family, this exact question was considered. The Supreme Court, after holding that the erection and use of the structure contemplated would be a nuisance *per se*, use the following language: "To say that such a nuisance must be suffered to be created and continued until its character shall be formally determined at law, would seem to be little better than a mockery of justice to him whose residence is affected thereby." This court has held that a privy so constructed as to contaminate the water of a well used for domestic purposes or which is allowed to remain in such a condition that persons dwelling near it are rendered uncomfortable by the escape of noxious smells and filthy matter, is a nuisance *per se*, and if the facts are clearly shown, it will, by a court of equity, be abated without a preliminary determination of the facts by a jury. *Iloff v. School Directors*, 45 Ill. App. 419.

A discharge of the product of the water closets of the village of Dwight into Gooseberry creek, and thence upon and through the premises of appellant by means of that stream would be a nuisance *per se*, and it is not such a case as requires the preliminary determination of a jury.

Appellee also contends that appellant is estopped from the

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relief sought, because of consent on his part to carry the sewage of the village through his farm by means of Gooseberry creek. It appears from the evidence that at a public meeting of the citizens of Dwight called to consider the feasibility of a sewer system, appellant was called upon for a speech in which he stated the manner of constructing sewers by special assessment, and is represented by some of the witnesses as saying that he was willing for the sewage to be discharged into Gooseberry creek, provided a sufficient flow of water was had to keep the sewage moving. Appellant explains that he had no reference to a general discharge of the village sewage, but only to such as would be discharged from the Keeley Institute, and that whatever was said at that time by him, or at any other time relative to his consent, was limited entirely to sewage from that institution.

When applied to for a deed giving the village the right, appellant refused. The village authorities did not regard appellant as having consented. The most that can be said of appellant's alleged consent is that it was simply an oral license revocable at any time. It was in the nature of an easement which can not exist, except by deed or prescription. Angell on Water Courses, Sec. 168; Washburn on Easements, 267; Bullen v. Runnels, 2 N. H. 255; Hall v. Ionia, 38 Mich. 493.

We do not regard the alleged errors of the refusal of the court to allow the bill to be amended as very material. Complainant was entitled to the relief sought, and there was not a sufficient variance between the allegations in the bill and proofs with reference to the character of the stream to require an amendment.

The decree is reversed and the cause remanded with directions to the Circuit Court to make the injunction perpetual. Reversed and remanded with directions.

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Illinois Central R. Co. v. The People, Use of Stephen R. Moore.

1. *Highways—Obstructions by Railroad Companies—Parol Dedication.*—In an action against a railroad company for obstructing a public highway crossing, it appeared that the public had used the crossing for thirty years, and that until a short time before the commencement of the suit, the company had recognized its right to do so. In the construction of a building on its right of way, it had left an opening the width of the street, and constructed approaches from both sides. It had constructed and maintained a plank crossing for the convenience of the public, erected and maintained at the place a sign-board reading "Railroad crossing, look out for the cars," and a portion of the time had kept a flagman there. *It was held*, that independent of any right acquired by the public by reason of long and continued use, such acts by the company furnished strong evidence of a parol dedication.

2. *Dedication—Evidence of Parol Dedication.*—Proof of a parol dedication must clearly show an intention on the part of the land owner to dedicate, but the proof may consist of acts of the owner mutually indicative of such intention, or his acquiescence in the use of the land in question, and under circumstances which would reasonably forbid such acquiescence if there was no such intention.

3. *Highways—Obstruction.*—Section 77, Ch. 174, R. S., providing that no railroad corporation shall obstruct any public highway, by stopping any train upon, or by leaving any car or locomotive engine standing on its tracks where the same intersects or crosses such public highway, is not violated unless the train, car or locomotive stopped or left standing thereon, forms an obstruction to travel.

4. *Verdict and Judgment—Objection to Form.*—Technical objections to the form of a verdict and judgment can not be made in the Appellate Court for the first time.

Memorandum.—Action for obstructing a highway. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

WHEELER & HUNTER, attorneys for appellant.

STEPHEN R. MOORE, attorney for appellee.

I. C. R. Co. v. The People.

OPINION OF THE COURT, HARKER, P. J.

This suit was brought by Stephen R. Moore, in the name of the people, for his use, under Secs. 77 and 78, Chap. 114, of the Revised Statutes, providing against the obstructing by railroad companies of highways. There were nine counts in the declaration charging appellant with having, on nine different days, obstructed Hickory street, in the city of Kankakee, at its intersection with the Illinois Central Railroad, by leaving standing thereon, cars, in violation of the statute. There was a trial by a jury, with a verdict in favor of appellee on each count, for \$15, aggregating \$135. The court overruled a motion for a new trial and entered judgment on the verdict.

The chief contention of appellant is, that the evidence fails to show that the place at which it is charged with having left its cars, is a public highway or crossing. It does not appear that Hickory street was ever formally laid out at the place in question, before the construction of the railroad track, or proceedings had since to open and extend the street across the track.

The evidence shows, however, that for a period of thirty years the public used this crossing, and that up to a short time before the commencement of this suit, appellant had recognized their right to do so. In the construction of buildings on its right of way, it had left an opening of the width of the street, had constructed approaches from both sides, had constructed and maintained a plank crossing for the convenience of the public, had erected and maintained at the place a sign, reading, "Railroad crossing, look out for cars," and for a portion of the time had kept a flagman stationed there. Independent of any right acquired by the public, by reason of long and continued use, these acts of appellant furnished pretty strong evidence of a parol dedication. We recognize the rule, that proof of a parol dedication must clearly show intention on the part of the land owner to dedicate, but the proof may consist of acts of the owner, naturally indicative of such an intention, or of his acquiescence in the public use under circumstances

which would reasonably forbid such acquiescence, if there was no such intention. We are unable to see that appellant was injured by any erroneous ruling of the court, on the admission of evidence.

The court improperly instructed the jury that it was sufficient to render the railroad company liable, if the proof showed that it left any car standing on the track where the same intersects or crosses the highway. The statute is not violated unless the car or cars formed obstruction to travel. But the testimony of Mr. Moore was that the cars, on the dates alleged, so stood upon the crossing as to obstruct travel. On this particular point he was not contradicted. There was no such question before the jury as that of total or partial projection of the cars.

The instruction worked no harm to appellant.

There is some criticism as to the form of the verdict and judgment. The objection is entirely technical and is made here for the first time. That is a sufficient reason why it should not prevail.

The judgment should be affirmed.

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49	542
49	540
59	257
49	540
82	682

Illinois Central R. Co. v. The People, Use of Stephen R. Moore.

1. *Highways—Obstruction by Cars, etc.*—Sec. 77 of Chap. 174, R. S., which provides that no railroad corporation shall obstruct any public highway by stopping trains upon or by leaving cars or locomotives standing upon its track where the same crosses such highway, is a penal statute, which, by well established rules of construction, must be strictly construed, and in a prosecution under it, it is not sufficient to show that the company left a car standing on its track where the same intersects or crosses the public highway. It must be shown that the car or locomotive obstructed public travel.

2. *Instructions—Erroneous—Conflict of Evidence.*—Where there is a conflict in the evidence upon a material branch of the case, the giving of an erroneous instruction is sufficient ground for reversing the judgment, although it would not be so were it not for the conflict of evidence.

I. C. R. Co. v. The People.

Memorandum.—Action for obstructing a highway. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

WHEELER & HUNTER, attorneys for appellant.

STEPHEN R. MOORE, attorney for appellee.

OPINION OF THE COURT, HARKER, P. J.

The facts in this case are substantially the same as in number 2562, *ante* (first preceding case), between the same parties, except as to that branch of the case relating to the acts of obstructing. Appellee recovered on three counts for obstructing Hickory street crossing in Kankakee, on the 28th, 29th and 30th days of September, and judgment was entered for \$150.

There was a sharp conflict in the testimony as to whether the crossing really was obstructed on those days, Mr. Moore testifying that cars stood upon the track on those days projected over upon the crossing so as to obstruct travel, while two of appellant's employes charged with keeping the crossings clear, and whose attention was called particularly to this one, testified that the cars projected over but a short distance and not so as to interfere with public travel at any time on the days mentioned.

The court instructed the jury that it was sufficient to render the railroad company liable if the proofs showed that it left any car standing on its track where the same intersects or crossed a public highway. In case of a wide street crossing, a car standing upon the railroad track may intersect the crossing without obstructing the crossing in the least. This prosecution is under a penal statute, which by a well established canon of construction, must be construed strictly. The language is: "No railroad corporation shall obstruct any public highway by stopping any train upon, or by leaving any car or locomotive engine

standing on its track when the same intersects or crosses such public highway," etc.

The purpose of the statute was to prevent the obstruction of public travel.

In view of the conflicting state of the evidence upon this branch of the case, we regard the giving of this erroneous instruction as sufficient ground for reversing the judgment. Reversed and remanded.

Illinois Central R. Co. v. The People, Use of Stephen Moore.

1. *Instructions—Erroneous but Harmless.*—In an action against a railroad company for obstructing a public highway by stopping any trains upon, or by leaving any cars or locomotive engines standing on its track where the same intersects or crosses such highway, the court erroneously instructed the jury that it was sufficient to render the company liable if the proof showed that it left any car standing on the track where the same intersects the crossing, but the evidence was clear that the cars did on the day alleged obstruct the crossing, and there being no countervailing testimony, *it was held*, that no harm was done by giving it.

Memorandum.—Action for obstructing a highway. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

WHEELER & HUNTER, attorneys for appellant.

STEPHEN R. MOORE, attorney for appellee.

OPINION OF THE COURT, HARKER, P. J.

The facts in this case are substantially the same as in number 2562 (second preceding case), *ante*, except that the obstructing of Hickory street crossing is shown to have been on a different day. There was a finding on one count for \$50, and judgment entered accordingly.

Blake v. City of Pontiac.

The evidence abundantly supports the verdict. We see no serious error of the court in ruling upon the evidence.

The court erroneously instructed the jury that it was sufficient to render the railroad company liable if the proof showed that it left any car standing on the track where the same intersects the crossing; but as the evidence was clear that the cars of appellant did, on the day alleged, obstruct the crossing, and there was no countervailing testimony as to that point, no harm was done appellant by the giving of it. Substantial justice was done and the judgment should be affirmed.

Blake v. City of Pontiac and Augustus E. Robinson.

1. *Cities and Villages—Liability for Lack of Accommodations, etc., in City Prison.*—The fact that tramps and vagrants were kept in the calaboose in company with the plaintiff, and that he was not kept in more select society while confined therein for the violation of an ordinance, and the further fact that he was offended by their rough and vile conversations, and became nauseated and sick, can not be charged against the city as an original complaint in constructing a prison.

2. *Cities and Villages—Calaboose Regulations.*—The building of the calaboose, and the establishing of regulations for the detention of prisoners therein, to answer to charges of violating the ordinances of the city, are clearly within the police power of municipal corporations and are not in their nature corporate acts.

3. *Cities and Villages—Enforcement of Ordinances.*—The making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, is within the power of a municipal corporation, and all persons officially charged with the execution and enforcement of such ordinances and regulations are *quo ad hoc* police officers.

4. *Cities and Villages—Arrest of Offenders.*—The arrest of a person on a charge of violation of an ordinance of a municipal corporation, and detaining him in the calaboose, is an act which such corporation is incapable of doing, except through its constituted officer—the city marshal—or some other person duly qualified by law to act. The municipal corporation can act in no other way except through its officers.

5. *Cities and Villages—Power to Commit Wrongs.*—A city, in the performance of its police regulations, can not commit a wrong through its officers in such a way as to render it liable for the torts of its officers.

49	543
78	314

49	513
180	156

49	543
182	139

49	543
97	834

6. *Cities and Villages—Power over Officers—Ratification.*—A city has no power to authorize a police officer to commit an unlawful act, and what it can not do directly, it can not do indirectly by ratification.

7. *Cities and Villages—Liability for Unauthorized Acts of Officers.*—The fact that the officers of a municipal corporation adopt ordinances and appoint a marshal to see that they are executed, does not render the municipal corporation liable for the unauthorized illegal and oppressive acts of the marshal as representative of the municipality. The officers of the municipality only empower the marshal to do that which the ordinances require, and not to oppress its citizens.

8. *Cities and Villages—Building of the City Prison.*—The building of the city prison is a lawful act, and its construction does not render the municipality liable for the wrongful imprisonment of persons therein, when they have done no act contributing to it.

9. *Cities and Villages—Duty in Regard to Calaboose.*—The statute neither requires nor allows a city or other municipal corporation to erect and maintain, as a city prison, an illegal structure, nor does it allow it to incarcerate prisoners therein; therefore such an illegal incarceration should not be regarded as an act of the municipality, as it has no power to do a wrong.

10. *Cities and Villages—Liability for an Act of its Officers.*—In an action brought against a city and the city marshal for arresting a person and confining him in a calaboose, where a city is simply exercising its police powers, any act of its officers or agents, including the directors or aldermen, in violation of and against the terms and spirit of the law, where acting as a legislative body or as mere agents and officers executing the ordinances, are *ultra vires* and in excess of the power of the city, and for such acts of such officers whereby damages accrue to any citizen there is no remedy against the corporation.

11. *Joint Actions—Municipalities and Municipal Officers.*—Where an action for a tort was brought against the several defendants, and in legal contemplation the act complained of could not have been committed by several persons and could only be considered the tort of the actual misdoer or the distinct tort of each, a separate action against the actual misdoers only, or against each, must be brought. So held, where an action was brought against a city and the city marshal jointly for arresting and confining the plaintiff in the calaboose.

Memorandum.—Action of trespass and case. Appeal from the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE FACTS.

This was an action originally instituted in trespass, against the City of Pontiac, and its marshal, Augustus E. Robinson, claiming damages for an alleged arrest and subse-

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quent detention in the calaboose of the city. Appellant, on April 23, 1892, filed his declaration, containing two counts in trespass, and on May 9th, by leave of court, he filed an additional count in case. The cause was continued until the October term, 1892, of the court, when the defendants interposed a general and special demurrer to the declaration and each and every count thereof. On November 29th, the demurrer was sustained, and plaintiff took leave to amend each count of the declaration, but subsequently withdrew his motion for leave to amend his declaration, and elected to stand by the same. Judgment *nil capiat per breve* was rendered for the defendants on the demurrer and the plaintiff appeals.

APPELLANT'S BRIEF, C. C. STRAWN, A. C. NORTON AND
W. T. AMENT, ATTORNEYS.

The question presented by this record is, whether a city, as a municipal corporation, is liable under the laws of this State for its own wrongful acts—wrongful acts that it has itself done—as distinguished from the wrongful and unauthorized acts of its mere ministerial officers and agents. And upon the proposition that such a corporation is liable in damages for its own wrongful acts, the same as other natural and artificial persons, there can not be the slightest doubt upon either principle or authority. To hold otherwise, would invest such corporations with all the sovereignty of government, and leave the citizen without recourse against the persecutions of the oftentimes ignorant and malicious administrators of a petty local jurisdiction. Dillon's Municipal Corporations, Sec. 972; Thayer v. Boston, 19 Pick. (Mass.) 511; Lee v. Sandy Hill, 40 N. Y. 442; Buffalo Turnpike Co. v. Buffalo, 58 N. Y. 639; Perley v. Georgetown, 7 Gray (Mass.) 464; Moore v. Railroad Co., 4 Gray (Mass.) 465; Howell v. Buffalo, 15 N. Y. 512; Angell & Ames on Corp., Sec. 311.

APPELLEES' BRIEF, R. S. MCILDUFF AND J. A. BROWN.
ATTORNEYS.

A municipal corporation can not be held for the torts of

its officers and agents, committed in the performance of acts which were wholly beyond the authority or power of the corporation. Neither is it liable for the illegal or unauthorized acts of its officers, though done *colore officii*, unless it previously authorized or subsequently ratified them. Me-
 cham on Public Officers, § 850, 851, 852; 2 Dillon on Municipal Corporations, § 950; Clodfelter v. State, 86 N. C. 51; 41 Am. Rep. 440; Lewis v. State, 96 N. Y. 71; 48 Am. Rep. 607; Rivers v. City of Augusta, 65 Ga. 376; 38 Am. Rep. 787; Davis v. Montgomery, 51 Ala. 139; 23 Am. Rep. 545; Forsythe v. Atlanta, 45 Ga. 152; 12 Am. Rep. 576; Reock v. Newark, 33 N. J. Law, 129; Smith v. Philadelphia, 81 Pa. St. 38; 22 Am. Rep. 731; White v. Charleston, 2 Hill, So. Car. 571; Hill v. Boston, 122 Mass. 344; 23 Am. Rep. 332; Perley v. Georgetown, 7 Gray, 464; Richmond v. Long's Admr's, 17 Gratt. 375; 94 Am. Dec. 461; Maximilian v. Mayor, etc., of New York, 62 N. Y. 160; 20 Am. Rep. 468; Buttrick v. City of Lowell, 1 Allen, 172; 79 Am. Dec. 721; Hafford v. City of Bedford, 16 Gray, 287; Wheeler v. Cincinnati, 19 O. St. 19; 2 Am. Rep. 368; Dargan v. Mayor, etc., City of Mobile, 31 Ala. 469; 70 Am. Dec. 505; Stewart v. City of New Orleans, 9 La. Ann. 461; Campbell's Admx. v. City Council of Montgomery, 53 Ala. 537; 25 Am. Rep. 656; Grumbine v. The Mayor, etc., of Washington, 2 McArthur, 578; 29 Am. Rep. 626; Brown v. Vinalhaven, 65 Me. 402; 20 Am. Rep. 709; Ogg v. Lansing, 35 Ia. 495; 14 Am. Rep. 499; Calwell v. City of Boone, 51 Ia. 687; 33 Am. Rep. 154; Hurlburt v. Litchfield, 1 Root 520; Elliott v. Philadelphia, 75 Pa. St. 347; 15 Am. Rep. 591; Welsh v. Village of Rutland, 56 Vt. 228; 48 Am. Rep. 762; Hayes v. City of Oshkosh, 33 Wis. 314; 14 Am. Rep. 760; Murtaugh v. St. Louis, 44 Mo. 479; Heller v. Sedalia, 53 Mo. 159; 14 Am. Rep. 444; Rowland v. City of Gallatin, 75 Mo. 134; 42 Am. Rep. 395; Prather v. City of Lexington, 13 B. Monroe 559; 56 Am. Dec. 585; Pollock's Admr. v. Louisville, 13 Bush 221; 26 Am. Rep. 260; Chicago v. Turner, 80 Ill. 422; Wilcox v. Chicago, 207 Ill. 334.

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OPINION OF THE COURT, LACEY, J.

This was an action in trespass and case, commenced by appellant against appellees, to recover damages occasioned by certain alleged wrongful and illegal acts done by appellee, whereby appellant was claimed to have received damages, and for which it is insisted the appellees were jointly and severally liable. The declaration consists of three counts to which appellees, joining severally, demurred. The court sustained it to each count, and the appellant abiding his declaration, judgment was rendered against him for costs, from which judgment this appeal is taken.

The declaration as finally amended consists of three counts—1, 2 and 3, and are in substance as follows, to wit: The first count avers in substance, that the city of Pontiac and defendant, Robinson, having arrested appellant in said city on a charge of being drunk and disorderly, in violation of the ordinances of the city, with force, and unlawfully detained him for a given period in a calaboose provided by the city for the detention of persons charged with and convicted for offenses against the ordinances of the city, in which calaboose there were, and for a long time had been, prior to the time of arrest, a large quantity of human excrement, and a large number of human lice and vermin, and foul and noisome, unwholesome, pestilential and poisonous stench, etc., rendering the same dangerous to human habitation; that the floor was constructed of common, rough building brick laid upon the earth, and was then, and had been for a long time, cold and damp and unfit for human beings to lie upon; that it was not provided with any bedding, chairs or furniture of any kind for the use, convenience or comfort of plaintiff, and other persons detained therein; that it was not provided with any privy vault or place or means of answering the calls of nature, etc., whereby appellant, while detained therein, was subjected to the humiliation and indecency of answering the calls of nature upon the floor of the calaboose in presence of both male and female prisoners therein; that during his imprisonment he was not

offered food or refreshments by the appellees or either of them; that for ten years prior to the detention of the appellant in said calaboose it had been occupied by "tramps" and other filthy persons, filled with vermin, etc., and unfit for occupation; that during the time of his confinement in prison he was compelled to associate with filthy persons, covered with vermin, who insulted and abused him by vile opprobrious language and threatened to take his clothing, etc., whereby he was sickened and injured in health and was exposed to public disgrace and humiliation of body and mind, and injured in credit and circumstances, and was thereafter for a long time rendered incapable of transacting his affairs and business, etc.

Second count. That defendants assaulted appellant, dragged him around, and struck him, etc., tripped him, and caused him to fall heavily on the sidewalk, greatly injuring him, and forced him in the calaboose, and there imprisoned him, without reasonable and probable cause, for five hours, and took him forcibly before a police magistrate of the city and then before a justice of the peace, and then again to the calaboose and there detained him in prison, without any probable cause, for thirty-five hours, contrary to law and against his will, and greatly hurt and bruised him and disgraced him and injured his credit.

The third count is much the same as the first, except it charges that the city was organized under the act authorizing the incorporation of cities and villages, approved April 10, 1872, and acts amendatory thereof, and as such corporation kept and owned the calaboose in question and maintained it for the detention of persons charged with violating the city ordinances; that appellant was arrested by Robinson, one of the appellees, who was marshal of the city, in his capacity as such, on a charge of violating the ordinances, and by him appellant was confined for forty hours in such calaboose. Then follows the same charge against the city for not keeping its calaboose in good condition—charges Robinson as one of the city's agents and officers, etc., and the city as principal, with keeping the calaboose in a filthy

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and unwholesome condition in manner as charged in the first count. The first and third counts of declaration charge that the floor of the calaboose was cold and damp and unfit for human beings to "lie and rest upon," but no charge is made in either count that appellant laid or rested on it.

The first count charges that the calaboose was not provided with bedding, chairs or furniture for the convenience of appellant; that it had no privy vault. But there is no charge, except inferentially, that appellant remained in the calaboose over night, or that he was not supplied with a bed, or that he suffered for the want of furniture.

The remaining points of complaint, for which damages are sought, and for which alone there appears to be any charge for damages, or any proper foundation laid for a claim of damages, is the filthy and untidy condition of the calaboose, arising from the neglect of the calaboose keeper in not keeping it clean. The fact that tramps and vagrants were kept in the calaboose in company with the appellant, and that he was not kept in more select society while in the calaboose, and that he was offended by their rough and vile conversation, and thereby became nauseated and sick, could scarcely be charged up against the city as a ground of original complaint in building the calaboose. In providing such a structure for the detention of persons, it might reasonably be anticipated that only the rough and criminal element of society, "tramps," and offenders against its peace and good order, would likely be detained therein, and considering how seldom it would be necessary to accommodate and entertain a real gentleman, it would seem an entirely unnecessary outlay of money to erect such a building provided with separate parlors for the especial accommodation of that class of offenders. So nothing could reasonably be charged against Pontiac for failing to do that.

The first and third count of the declaration charges that the appellant "during his imprisonment in the calaboose was not offered any food or refreshment by the defendants or either of them." It will be seen that there is no averment that appellant suffered for want of food and refresh-

ments, or that he did not furnish them for himself, or that he was willing to accept calaboose fare or wanted it, or specified what kind of refreshments he wanted, if any.

This suit is brought to recover against the appellees jointly for failure to keep the city calaboose in a proper condition, and for wrongfully arresting the appellant, and incarcerating him in the city prison. The charges in the declaration are of a nature such as municipal corporations are not liable for as acts done in their private or corporate character. The acts in question are such only as the city was empowered to perform in its public capacity. The acts complained of were performed plainly in the exercise of the police power. The building of a city calaboose and the regulations for the detention of prisoners to answer charges against the ordinances of the city are clearly within its police powers, and are not in their nature corporate acts. In *Culver v. The City of Streator*, 130 Ill. 238, this power is described "As comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are *quo ad hoc* police officers."

The declaration in question seeks to avoid "conclusions to be drawn from the character of the duties which" Robinson was employed to perform, at the time of the arrest, the same as was done in *Culver v. City of Streator*, *supra*.

The first count charges that the city of Pontiac and Robinson arrested appellant on a charge of violating the ordinances and detained him in the city calaboose. This was an act the city was incapable of doing except through its constituted officer, the city marshal, or some other person duly qualified by law to act. Though the manner in which the city could or did act in the matter is not stated, the court will take notice that it could act in no other way except through its officers.

In the second count the city, jointly with Robinson, is charged with making an assault on the appellant and forc-

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ing him into the calaboose. This, again, the city is not capable of doing except through its officers, and this must be regarded as a charge only against Robinson as marshal.

In the third count the city is charged, after the arrest of appellant by the city marshal, appellee Robinson, on a charge of violating the city ordinances, of (jointly with Robinson, whom it denominates as the city's servant or agent,) incarcerating him in the calaboose in manner complained of. This can mean nothing more nor less than that Robinson was the city marshal, and in that capacity was the servant and agent of the city. In fact he was not the servant and agent of the city in the sense intended in the declaration. He was simply a public officer acting under city ordinances and the statute. If there were any possible way in which the city could commit the joint acts of trespass it should be shown by the declaration.

It appears to be well established by law that a city, in the performance of its police regulations, can not commit a wrong through its officers in such a way as to render it liable for his torts. Many cases go to this extent, and none that we are aware of hold differently. The case of *Caldwell v. City of Boone*, 51 Ia. 687, 33 American Rpt. 154, was an action to recover for an assault and battery and false imprisonment of the defendant by deputy marshal, in arresting and hand-cuffing and imprisoning the plaintiff under pretense of enforcing an ordinance of the city providing for the punishment of persons being drunk and upon the streets, and on appeal, the Supreme Court held the defendant, the city, not liable, and in deciding, said: "It is contended, however, that if the city be not liable in the first instance for the illegal acts of its officers in enforcing a police regulation, it may become liable by ratification. But a city has no power to authorize a police officer to commit an unlawful act, and what it can not do directly it can not do indirectly by ratification. The same consideration disposes of the allegation that the deputy marshal was an unfit person for the office."

The same rule was held in *Hurlburt v. Litchfield*, 1 Root, 520, where it was held that constables, though appointed by

the town, are not its agents or servants, and the town was not liable for their default, the statute not having so provided. The principle here announced is not a new one in this State. The question has been before the Supreme Court in several instances, the first being *The Town of Odell v. Schroeder and Wife*, 58 Ill. 353, which case on its facts is similar in its main features to the one at bar, for the appellees in that case sought to recover for the illegal arrest of Mrs. Schroeder, and her subsequent imprisonment, by the constable, in the calaboose of the town, which was claimed to have been improperly kept, which fact was insisted upon to aggravate damages. The court held very pointedly, "that the fact that the trustees adopted the ordinances and appointed the town constable to see that they were executed did not render the town liable for the unauthorized, illegal and oppressive acts of the officer. . They, as representatives of the town, only empowered him to do what the ordinances required, and not to oppress citizens of the place." Where they exceed their duties, the appointing power is not responsible for the wrong.

On the question of the improper construction of the calaboose, the court say: "The building of the prison was a lawful act and its construction did not render the town liable for the wrongful imprisonment of persons therein when they have done no act contributing to it." While the court holds that the town would not be liable for any injury arising from the improper construction of the prison, it intimates, although it does not decide, that the trustees of the town might be liable individually on account of such wrongful construction. The town itself, however, it says, "would not be liable for creating a noisome, unhealthy and uncomfortable prison and requiring persons by ordinance to be incarcerated in it." The substance of the opinion is, that the erecting and maintaining such a prison and requiring by ordinance prisoners to be kept in it, could not be regarded as a corporate act. The statute neither requires nor allows a city or other municipal corporation to erect and maintain such an illegal structure; nor does it allow it to incarcerate

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prisoners therein. Therefore, it should not be regarded as the act of the corporation, as it has no power to commit a wrong. The people and tax payers are not responsible for such illegal acts, nor, it says, would "any information the trustees may have had in reference to such illegal imprisonment, even had they participated in it, render the corporation liable any more than the knowledge of any other citizen would." The same doctrine was held in *Chicago v. Turner*, 80 Ill. 422; also in *Wilcox v. Chicago*, 107 Ill. 334. In the latter case the Supreme Court held that the general rule of *respondeat superior* has no application in this State to the case of the injury of a person by and through the neglect of a member of a fire department of a city while in discharge of his duty, and the exemption is put upon the ground of public policy. See also, *Arms, Adm'r, v. The City of Knoxville*, 32 Ill. App. 605; *Culver v. City of Streator*, 34 Ill. App. 77; same case on appeal, 130 Ill. 243.

It was held by the Supreme Court of the State of Maine in *Brown v. Vinalhaven*, 65 Maine, 402, that the defendant town was not liable for suffering a nurse employed in the small-pox hospital established by the town, to depart without being properly disinfected, whereby plaintiff caught the disease; a much more serious matter than the contraction by the appellant of *plica polonica* from the unkempt heads and unwashed bodies of the traveling men, popularly called "tramps," confined in the Pontiac calaboose, as complained of in the declaration.

It appears, then, from a review of all the authorities, that in this case, where the municipal body is simply exercising its police powers, any acts of its officers or agents, including the board of trustees or aldermen, in violation and against the terms and spirit of the statute when acting as a legislative body or as mere agents and officers executing the ordinances, are *ultra vires* and in excess of the power of the city, and for such acts of such officers whereby damage occurs to any citizen there is no remedy against the corporation. Therefore it follows that the charges in the declaration that the city of Pontiac committed the offense therein charged,

could not be legally true, as the city is an incorporated body and can not act without agents, and it can have no agents who can commit illegal acts for which it is responsible.

The point is made by counsel for appellant that inasmuch as the demurrer was joint, if one count of the declaration was good against either party then the demurrer should have been overruled, because, he claims, the second count was good at least against Robinson. We think this point is not well taken, for the law seems to be settled that there are some torts in legal consideration that may be committed by several parties for which joint action may be supported against all the parties. "But if in legal consideration the act complained of could not have been committed by several persons and can only be considered the tort of the actual aggressor or the distinct tort of each, a separate action against the actual misdoers only, or against each, must be brought." "Therefore they may demur which should be sustained where the action is brought against both." Vol. 1, Chitty's Pleadings, 14th American Ed., Secs. 85 and 86.

An action against a husband and wife for joint torts can not be maintained. *McKeowen v. Johnson*, 1 McCord (S. C.), 578. A corporate bank can not be sued jointly with a natural person for an assault and battery because the bank can not commit an assault and battery. *Orr v. The Bank of the United States*, 1 Ohio 25; See *Yeazel v. Alexander*, 58 Ill. 261; *Davis v. Johnson*, 41 Ill. App. 23.

The judgment of the court below is therefore affirmed.

Goldsbrough v. Gable.

1. *Landlord and Tenant—Hold Over—Presumption.*—Where a tenant remains in the possession of premises after the expiration of his term, the presumption of law is, in the absence of anything to show to the contrary, that he is satisfied with the terms of his lease, and intends to create a tenancy for the future upon the same conditions, and when the landlord accepts rent at the old rate, a similar presumption arises as to him.

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2. *Landlord and Tenant—Presumption as to Holding Over--Rebuttal.*—Where a tenant is holding over after the expiration of his term, the presumption that he intends to create a tenancy for the future upon the same conditions as to him, can not be rebutted by proof of a contrary intention on his part alone; and if the landlord has not assented to its terms, he has a right to insist upon the presumption and exercise his election accordingly.

3. *Landlord and Tenant—Presumption from Holding Over.*—Where a tenant is holding over after the expiration of his lease, the presumption that he intends to create a new tenancy, is not one that the court is compelled to draw from the fact of the holding over, if the evidence shows that the intention presumed did not, in fact, exist on the part of either landlord or tenant, or if they have agreed differently, the presumption will not avail.

4. *Landlord and Tenant—Right to Contract for Future Tenancy.*—The fact that the tenant is holding under a lease which is not yet expired, does not affect his right to create a new tenancy on different terms, after the expiration of his lease, and a verbal agreement for such a tenancy upon any terms to which the parties may agree, if executed, will be effective and binding.

5. *Landlord and Tenant—Consideration for a New Lease.*—Where a tenant is holding under an unexpired lease, an agreement to remain fater its expiration and pay rent, will be a good consideration for a new lease, and it will not be necessary for him to formally vacate the premises and re-enter under the new lease. The law requires no such useless ceremony.

6. *Landlord and Tenant—Presumptions as to Holding Over—When Rebutted.*—The fact that a tenant refused to remain on the premises upon the same rent provided in his original lease, suficiently rebuts the implications of an intention on his part to enter upon the new tenancy, and the fact that the landlord agreed, if the tenant would stay, it should be at a rent below the rate fixed by the existing lease, is competent evidence to show that the landlord did not intend to create a new tenancy at the rent provided in the original lease.

7. *Landlord and Tenant—Holding Over Pending Negotiations for a New Lease.*—Where a tenant is holding over after the expiration of his term, upon a new tenancy, in pursuance of an agreement with his landlord for a reduction of the rent, the payment and acceptance of the rent at the old rate, while negotiations are pending for a new lease, will not abrogate the agreement and restore the terms of the expired lease, or be conclusive of the intention to continue payment of rent at the old rate. Such an agreement to reduce the rent is a sufficient consideration for new tenancy.

Memorandum.—Action of covenant upon a lease. Appeal from a judgment rendered by the Circuit Court of Peoria County; the Hon. THOMAS N. SHAW, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, McCULLOCH & McCULLOCH, ATTORNEYS.

A lease is more than an executory contract. It creates an estate in lands. "But although a lease is necessarily a contract, yet it is a contract which creates an estate; and by the law of England an estate is assignable, although a contract is not so. And the landlord, therefore, may assign over his estate in reversion, the tenant his estate in his term; and thus the parties to the relation may be altered, either by a change of landlord or a change of tenant or a change of both landlord and tenant." Smith's Landlord and Tenant, 279.

The estate may be continued after the termination of the lease by the tenant holding over and paying rent according to the terms of the lease.

The rule which binds the landlord as well as the tenant, is thus stated in Smith's Landlord and Tenant, pp. 219-21: "But, though at the end of the lease, if the tenant holds over, he holds over as tenant at sufferance—still, if, when the period for payment of rent comes, he pays to his landlord the rent reserved by the expired lease, he becomes tenant from year to year; the payment of such rent by him, and the receipt of it by his landlord, being considered indicative of their mutual intention to create a yearly tenancy; and thereupon the statute of limitations ceases to run against the landlord, who acquires a new reversion expectant on the yearly tenancy, and the tenant becomes entitled to the ordinary notice to quit. And it is remarkable that the yearly tenancy thus raised is governed, not by the simple rules which govern yearly tenancies in the absence of express stipulation, but by the provisions of the expired lease, so far as they are consistent and compatible with a yearly holding." See also Doe d. Rigge v. Bell, 5 T. R. 471; Richardson v. Gifford, 1 A. & E. 52; Beale v. Sanders, 3 Bing. N. C. 850; Prouty v. Wood, 2 Hill (S. C.), 367; Brewer v. Knapp, 1 Pick. (Mass.) 335; Dillon v. Roberts, 13 Serg. &

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R. (Penn.) 60; Bacon v. Brown, 9 Conn. 234; Dorrill v. Stevens, 4 McCord, 59; DeYoung v. Buchanan, 10 Gill & J. 149; Philips v. Menges, 4 Whart. 226; Conway v. Starkweather, 1 Denio, 113; Jackson v. Patterson, 4 Harr. 534; Hawkins v. Pope, 10 Ala. 493; Lockwood v. Lockwood, 22 Conn. 425; Prickett v. Ritter, 16 Ill. 96; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Webster v. Nichols, 104 Ill. 160; McKinney v. Peck, 28 Ill. 174.

APPELLEE'S BRIEF, GEORGE B. FOSTER, ISAAC C. EDWARDS,
AND JOSEPH A. WEIL, ATTORNEYS.

If the holding over is shown to be with the understanding between the parties that it should not operate as a renewal of the original lease, this will rebut the presumption arising by implication. Quinlan v. Bonte, 25 Ill. App. 240.

The legal presumption of a renewal of the tenancy, arising from a holding over, may be rebutted by proof of a different intention, but it must be shown that such different intention was participated in by both landlord and tenant. Wolz v. Sanford, 10 Brad. 136.

OPINION OF THE COURT, CARTWRIGHT, J.

This is the same case that was before this court on a former appeal. Goldsbrough v. Gable, 36 Ill. App. 363.

On appeal from this court to the Supreme Court, the judgment of this court and the Circuit Court were reversed, and the cause was remanded to the Circuit Court for a new trial. Goldsbrough v. Gable, 140 Ill. 269. The Supreme Court held that the Circuit Court erred in admitting evidence of an agreement for the reduction of rent, and in refusing to instruct the jury that such agreement, if made, was invalid and could not be enforced. This holding was based upon the facts shown by the evidence in the record, that appellee had remained in possession after the expiration of the written lease without any new contract with appellant in respect to such continued possession, and that appellant had accepted the payment of rent for one month thereafter at the old rate,

whereby appellee became tenant of the premises from year to year subject to the same rent as was provided to be paid in the original lease. The agreement of appellant to accept a less sum, by which appellee was not required to do anything which he was not already bound to do, was therefore held to be without consideration.

The case has been again tried, resulting in a verdict and judgment for appellee.

On the last trial the evidence on the part of the defendant concerning his continued possession, after the expiration of the first lease, and the agreement for a reduction of rent, tended to prove, and in our opinion justified the jury in finding the following facts: In the latter part of February, 1884, before the expiration of the lease under which defendant was holding, which was in writing and under seal, and would expire March 18, 1884, the plaintiff was informed by defendant that he would not occupy the premises after the expiration of such lease at the same rental, and that, unless the rent was reduced, he should go out, and plaintiff could have the building. Defendant was then paying rent for the building at the rate of \$70 per month, as provided in the written lease, and told plaintiff that he ought to have it for \$40 per month. Plaintiff refused to reduce the rent for a new term to \$40, and said that he ought to have \$60. No amount was then agreed upon, but the plaintiff said that defendant should stay in the premises, and that he would reduce the rent. Defendant remained in possession, and at different times sought for an agreement as to the amount of rent, but the agreement was not concluded and the amount fixed until July 9, 1884, when defendant offered to pay \$50 per month, and to pay it semi-monthly instead of monthly, as he had been doing, and the proposition was accepted by plaintiff, conditioned on such rent becoming due semi-monthly. Defendant had paid rent to May 18, 1884, at the old rate, but after the agreement was concluded he paid, and plaintiff accepted, rent at the rate of \$50 per month for more than four years during defendant's occupancy of the premises, to October 18, 1888. Defendant paid the whole rent at the rate

Goldsbrough v. Gable.

of \$50 per month by his checks and in repairs made at plaintiff's request.

The controversy now is whether, upon these facts, the defendant became a tenant of the premises under plaintiff from year to year, upon the same terms and subject to the same rent, as provided in the original lease.

When a tenant remains in the possession of premises after the expiration of his term, the law presumes, in the absence of anything to show the contrary, that he is satisfied with the terms of the lease under which he has been holding, and intends to create a tenancy for the future upon the same conditions. So, when the landlord accepts rent at the old rate, a like presumption arises as to him. The presumption as to the tenant can not be rebutted by proof of a contrary intention on his part alone, and if the landlord has not assented to different terms, he has a right to insist upon the presumption, and exercise his election accordingly. But we do not understand that the presumption is one that a court is compelled to draw from the fact of holding over, if the evidence shows that the intention presumed did not in fact exist on the part of either landlord or tenant, or if they have agreed differently, the presumption will not prevail against their joint intention. *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151.

In this case, when the promise was made by plaintiff to reduce the rent in case defendant would remain in possession, the written lease had not expired. It would expire March 18, 1884, and defendant had a legal right to leave the premises at that time. The fact that there was such a lease under which defendant was holding, could not at that time affect the right to create a new tenancy on different terms after its expiration. A verbal agreement for such a tenancy on any terms which the parties might agree upon, if executed, would be valid and binding. An agreement of defendant to remain and pay rent would be a good consideration, and it would not be necessary for him to formally vacate the premises and re-enter under the new lease. The law requires no such useless ceremony. *Dills v. Stobie*, 81 Ill. 202.

The fact that defendant refused to remain upon the same terms as to the amount of rent provided in the original lease, rebutted the implication of intention on his part to enter upon a new tenancy on those terms, which he expressly refused to be bound by. The fact that the plaintiff agreed that if the defendant would stay it should be at a reduced rent, below the rate fixed by the existing lease, proved that he did not intend to create a tenancy at the same rent provided in such lease. It is urged that the agreement to reduce rent could not rebut the legal presumption, because the amount of such reduction was not agreed upon before the expiration of the original lease, but we can not see that the amount of the reduction was of any consequence on the question whether the intention was that it should be the same. Plaintiff expressed a willingness to reduce it \$10 per month, and if it was reduced that much, or reduced at all, it would not be the same. If it was not to be the same, it does not seem material on that question how much less it was to be. The joint understanding and intention was that it should be less, and in our judgment the legal presumption that it should be the same was thereby met and overcome.

Defendant entered upon the new tenancy in pursuance of the agreement for a reduction of rent, and we do not think that the payment and acceptance of rent for a short period at the old rate, while the negotiations were pending, would abrogate the agreement, and restore the terms of the expired lease, or be conclusive of an intention to continue payment at that rate. Efforts were being made to have the amount of the reduction agreed upon, and they had not failed or ceased. The agreement to reduce the rent was upon a good consideration, and defendant was insisting on the performance of it. When the amount to be paid was finally settled, it was upon the further consideration that it should be paid semi-monthly, which was done. We think the agreement was not void for want of consideration.

What has been said disposes of the questions raised on instructions. The judgment will be affirmed.

Loucheim v. Seyfarth.

Loucheim et al. v. Seyfarth et al.

49	561
189	214
49	561
102	276
102	300

1. *Fraud—Not Presumed, When.*—Where a firm engaged in merchandising, sold out their business to another firm, to whom they were indebted in a large amount, and the purchasers took possession, immediately removed the sign board, put their own in its place and advertised the change, *it was held*, that the sale was not necessarily fraudulent because one of the firm of the vendors was employed to remain in the store as a salesman, by the purchasers, after the sale.

2. *Courts—Finding of the Trial Court.*—The finding of the lower court is always given great weight in the Appellate Court, from the fact that the judge trying the case, and hearing and seeing the witnesses, is in better position to judge of the weight proper to be given to the evidence than the Appellate Court, that court not having the benefit of the presence of the witnesses and of hearing them testify; therefore, unless the finding of the court below is greatly against the weight of the evidence, its judgment will not be disturbed.

Memorandum.—Creditor's bill. Appeal from the Circuit Court of Carroll County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed December 12, 1893.

The statement of the facts is contained in the opinion of the court.

HENRY MACKAY, attorney for appellants.

APPELLEES' BRIEF, GEORGE L. HOFFMAN, ATTORNEY.

An insolvent debtor has the right to sell his property to pay his debts, and where the design of such an act may be traced to an honest and legitimate source equally as well as to a corrupt one, no fraud can be presumed. *Bowden v. Bowden*, 75 Ill. 143; *Wood et al. v. Shaw et al.*, 29 Ill. 444; *Waddams v. Humphrey*, 22 Ill. 663.

The law allows a debtor in good faith to prefer a particular creditor, when the creditor is seeking to secure his debt in good faith. *Morris v. Tillson et al.*, 81 Ill. 607.

Where a vendee employs his vendor as a clerk to sell goods, although the fact may excite suspicion, it is not fraudulent. *Warner v. Carlton*, 22 Ill. 415.

A debtor has a right to sell his stock of goods to a creditor in satisfaction of his debt. The mere doubt of the fairness of such transaction is not sufficient; fraud must be proved by a preponderance of the evidence. *Waterman v. Donelson*, 43 Ill. 29; *Dreyer et al. v. Durand et al.*, 80 Ill. 561; *Nelson v. Smith et al.* 28 Ill. 495; *Holbrook v. First National Bank*, 10 Brad. 140; *C., B. & Q. R. R. Co. v. Watson et al.*, 113 Ill. 196.

The presumption of law is that dealings between relatives are fair and honest without any wrongful or fraudulent intent, and no presumption of fraud attaches to such dealings. *Schroeder v. Walsh*, 120 Ill. 403; *Baldwin v. Freyendall*, 10 Brad. 106; *Mey et al. v. Gulliman*, 105 Ill. 272.

Where the witnesses in a chancery suit are examined orally on the hearing, so that the judge has the same facilities for judging of their credibility as in a trial at law, the error in the finding of fact must be clear and palpable to authorize a reversal. *Coari v. Olsen*, 91 Ill. 273; *Lane v. Lesser et al.*, 135 Ill. 567.

OPINION OF THE COURT, LACEY, J.

This was a bill in equity brought by appellants against appellees in the nature of a bill of discovery seeking to set aside the sale of a stock of dry goods, boots and shoes, clothing, and book accounts, made by appellee, Edward Seyfarth, to his uncle, Charles Seyfarth, and Henry Baier, also appellees. The nature of the transaction was that prior to the sale of the stock of goods and book accounts, occurring on December 21, 1889, the appellee, Edward Seyfarth, was the owner of the goods and engaged in business in retailing them, and in the course of his business became indebted to appellants for goods furnished him by them, in the course of trade, amounting to the sum of \$425, on account of which indebtedness the appellants, on June 27, 1891, recovered a judgment for that amount in the Circuit Court of Carroll County, against the appellee, Edward Seyfarth. Execution was afterward issued on this judgment and returned by the sheriff of said county, no property found. Afterward this

Loucheim v. Seyfarth.

bill was filed to set aside the sale above named as fraudulent. On the 15th day of March, 1893, the case was heard in the Circuit Court on bill, answer and replications, and on oral evidence heard in open court, principally on the evidence of Edward Seyfarth, introduced by appellants. It appears from the evidence that the appellee, Edward Seyfarth, prior to the sale, had been engaged in the retail dry goods business in the said county, and had become largely indebted beyond his ability to pay, owing the appellees, Charles Seyfarth and Henry Baier, something over \$9,000, besides other debts amounting to \$6,000, embracing that of appellants; that in this condition of affairs, desiring to prefer his uncles, he sold his entire stock of goods in his store and book accounts, which had been invoiced the June previously at \$14,000, \$3,000 of which were book accounts, to his said uncles, for the amount of their claim against him, and gave them the possession of the goods and the store building containing them, and the books containing the account; that thereafter they had continued to occupy the building and carry on the store until a short time prior to this trial, when they sold out to Johnson & Co. In order to establish the fraud claimed, the appellants' main complaint is that appellee Edward Seyfarth remained in the store as salesman, from, at or near the day of the sale, and that such fact was sufficient to fix the transaction as fraudulent, and to shift the burden of proof upon the purchasers to show to the contrary. We think, however, that all the facts shown by the evidence were not sufficient to establish the allegations of the bill as respects fraud, even *prima facie*. The evidence shows that immediately after the sale, appellees Charles Seyfarth and Henry Baier took possession of the stock of goods and the store, and removed Edward Seyfarth's sign and placed their own over the door in its stead, and advertised the change of ownership and the sale of the goods, and that Edward Seyfarth went out of the store, and was not employed by the purchasers as managing salesman for about ten days thereafter, when he was employed at \$75 per month to manage and conduct the business, the

purchasers not being experienced men in that line of trade; but ever afterward Seyfarth and Baier gave the business close attention. Appellants' judgment in question was not rendered for a year and a half after the sale, when the public generally knew of the changed ownership of the store. The appellants claim that there was a great inadequacy of consideration, apparently because the goods had been invoiced at \$14,000. We think, however, that the evidence fails to establish such charge, the goods being an old stock and damaged by fire, occurring previously, and some shop worn, and some of the accounts were uncollectible; and no witness swears that the stock of goods would have brought more than \$9,000 in the general market. The circuit judge heard the witnesses orally and found the issues against the appellants. The finding of the lower court is always given great weight in the Appellate Court from the fact that the judge trying the case, and hearing and seeing the witnesses, is in better position to judge of the weight properly to be given to the evidence than the Appellate Court, not having the benefit of the presence of the witnesses and of hearing them testify; therefore, unless the finding of the court below is greatly against the weight of the evidence, its judgments will not be disturbed. We think, under all the evidence in the case, the appellants failed to establish the charge of fraud in the sale, and that the Circuit Court was justified in dismissing the bill. The decree of the Circuit Court is therefore affirmed.

Maxwell v. Willett et al.

1. *Usury—Taking Interest in Advance.*—A lender of money may retain his interest in advance and deduct it from the principal sum loaned without being liable to the charge of taking usurious interest.

Memorandum.—Bill to foreclose a trust deed. Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

Maxwell v. Willett.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, WILSON & CHURCH AND H. BIGELOW,
ATTORNEYS.

If there is any settled rule of law in this State, it is that the taking of interest in advance for one year or less on the principal sum loaned or foreborne is not usury. McGill et al. v. Ware, 4 Scam. 21; Goodrich v. Reynolds, 31 Ill. 490; Mitchell v. Lyman et al., 77 Ill. 525; Brown v. Scottish Am. Mort. Co., 110 Ill. 235; Telford v. Garrels et al., 132 Ill. 550.

PEPPER & SCOTT, attorneys for appellees.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellant filed his bill to foreclose a trust deed made by appellees to secure a note of appellee Abraham A. Willett, made March 1, 1876, for \$1,400, due one year after date, with interest at ten per cent from maturity. The defendants answered the bill, admitting the execution of the note and trust deed, setting up usury, and alleging that the transaction was a loan of \$1,246, for one year, on which \$154 interest was taken, making up the amount of the note, and averring that the \$1,246 had been paid.

A cross-bill was also filed alleging usury and payment of the principal, and praying for a release of the trust deed. The cross-bill having been answered, the cause was referred to the master to take and report proofs, and to state an account with his findings. The evidence was taken by the master, who found and reported to the court on the question of usury as follows: "The amount actually loaned in this case was \$1,260, and the interest reserved by the complainant \$140, being eleven and one-ninth per cent interest for one year on said amount actually loaned, or \$14 more than ten per cent, the legal contract rate of interest at that time. I therefore find the transaction was usurious." The master further found that the rate of interest on the note was reduced by complainant to eight per cent at some time

not determined by the master, and he proceeded to state an account crediting defendants as against said supposed principal of \$1,260, with the amounts paid and endorsed on the note as interest, from which statement he found that the note had been over-paid to the amount of \$215.22.

Appellant objected to these findings on the question of usury, but the objections were overruled, and upon like exception before the court the report was confirmed and it was decreed that complainant's bill be dismissed at his costs, and that the trust deed should be released of record. From that decree this appeal was prosecuted. The evidence taken and returned by the master affords no support to the answer of defendants or to the findings of the master on the claim of usury. The answer averred that the contract was for the loan of \$1,246 for one year, and that complainant took the note for \$1,400, with interest after due at ten per cent, and retained \$154 as interest, which would be a retention of ten per cent interest on the \$1,400, and ten per cent on such interest. The evidence entirely failed to sustain that allegation. The defendant, Abraham A. Willett, testified that the contract was that he was to pay complainant ten per cent in advance; that there was no other interest included; that the interest was to be and was paid in advance. It is beyond question that Willett received \$1,260, and \$140 was retained. Counsel, in the examination of Willett, by stating to him the proposition that the consideration of \$1,400 was made up of the principal sum of \$1,260, and ten per cent on that for a year, making \$126, and ten per cent on the \$126, making \$12.60, obtained his assent to it. Inasmuch as the addition of those amounts did not produce \$1,400, and the statement was at variance with his testimony as to the contract, his assent to it was evidently a mistake. The note was taken for \$1,400, and drew no interest until due, one year after date; ten per cent of that amount was retained and the balance was paid over. That a lender may so retain interest in advance is the settled rule of law in this State. *McGill v. Ware*, 4 Scam. 21; *Goodrich v. Reynolds*, 31 Ill. 490; *Mitchell v. Lyman*, 77 Ill. 525; *Brown v. Scottish Am. Mort. Co.*, 110 Ill. 235.

Tibbits v. R. I. & P. Ry. Co.

In every case where the highest contract rate of interest allowed by law is taken in advance out of the principal, if interest is computed on the remainder, as it is sought to have done in this case, it would not equal the amount retained. The fact that \$140 would amount to eleven per cent on such remainder, and that complainant stated that self-evident fact when the loan was made, would not change the rule of law, or abridge complainant's rights. He had a right to do what he did without making the contract usurious. The finding of the master and the court could only be sustained by denying the right to take payment in advance of a lawful rate of interest, and as the law is settled otherwise, the decree will be reversed and the cause remanded.

Tibbits & Son v. Rock Island & Peoria Ry. Co.

1. *Bills of Lading—Use of, to Obtain Advances on Shipments.*—Bills of lading are constantly used by shippers to obtain advances upon their shipments. It is to be expected by the carrier that such use will be made of them; that advances will be made upon the faith that the property described in them is in the possession of the carrier, and will be delivered to the holder of the bills of lading. Persons trusting in them and relying upon their truth do only what the carrier has every reason to expect will be done. Such use is a material aid to traffic and business, and is to be recognized as an important and useful factor in the business of the country.

2. *Bills of Lading—"Contents and Value Unknown."*—Where a bill of lading of a carload of corn, made by filling up a general blank form for shipping all sorts of freight, contained in a parenthesis the words "contents and value unknown" evidently intended to apply to packages therein mentioned, the contents of which are concealed from view, *it was held* that such a condition in a bill of lading does not apply to corn in bulk loaded into a car from an elevator.

3. *Bill of Lading—Carrier Bound by its Statements, etc.*—Where a person advances money on the faith of a bill of lading as between him and the carrier issuing it, the carrier is bound by the terms of the bill and he can not be permitted to escape his liability by showing that the statements contained in it are false.

4. *Bill of Lading—Weight Stated Subject to Correction.*—A bill of lading contained a statement that the weight, referring to the articles

shipped, was subject to correction. *It was held* that, so far as the statement was concerned, a reasonable construction must be given to it, such as the parties would naturally give when the shipment was made. Errors and mistakes are liable to occur in weighing merchandise, and the right reserved in the bill to correct such errors applied to such ordinary errors and differences in weighing as might be reasonably expected to occur and not to such errors as would be apparent to the sight.

5. *Common Carriers—Bound by Statement of Quantity in Bills of Lading.*—T. H. & Co., of Peoria, delivered to the R. I. & P. Ry. Co. a quantity of corn for shipment. It was loaded into a car from an elevator; weighed by the weighmaster of the Board of Trade; properly sealed and shipped to its destination. T. H. & Co. procured from the railroad company a blank bill of lading which they filled up by inserting the weight as given by the weighmaster, and the company's agent signed it. They then forwarded the bill of lading to T. & S. at the point of destination and drew upon them for the price of the corn, according to the weight as stated. The car arrived at its destination in good order, none of the corn having been lost on the way. T. & S. paid the draft and the freight according to the weight stated, but upon opening the car a shortage of 14,336 pounds was found in the corn and for this they brought suit against the railroad company. The bill of lading contained a column at the top of which was the word "Weight," under which were the words "subject to correction." In this column the weight of the corn was set down. The bill also contained the words "contents and value unknown;" under these conditions the company sought to defeat the suit but it was held that the plaintiff had a right to recover.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Peoria County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANTS' BRIEF, RICE & GRAYBILL, ATTORNEYS.

A bill of lading becomes conclusive on the carrier where the consignee or other parties act upon the faith of representations and make advances or give credit, relying upon its truth. Redfield on Carriers, Sec. 247.

The carrier should be careful not to sign a bill of lading until the goods are actually delivered to him. By so doing he may become responsible for them. Abbot on Shipping, 323.

Tibbits v. R. I. & P. Ry. Co.

According to the course of trade and business, it is necessarily the fact that the carrier alone knows and ought to know the contents of the car, especially when it is sealed. If "contents and value unknown" apply to anybody in such a case, it would mean that the shipper and the consignee, but especially the consignee, knew nothing of the contents of the car, and they do not know and they have no means of knowing it except as represented to them by the carrier. For this representation the carrier is responsible. *Dickerson v. Seelye*, 12 Barb. (N. Y.) 99; *Armour et al. v. M. C. R. R. Co.*, 65 N. Y. 111; *St. L. & I. Mt. v. Larned*, 103 Ill. 295; *M. C. R. R. v. Phillips*, 60 Ill. 198; 2 Redfield on Railways, 143; *Portland Bank v. Stubbs*, 6 Mass. 422; *Abbott on Shipping*, 324; *Howard et al. v. Tucker et al.*, 1 B. & Ad. 712.

It is reasonable to suppose that the words "weight subject to correction" printed in the blank bill of lading, like the other printed words, "contents and value unknown," were not intended to apply at all to shipments where the freight was grain in bulk. But if they have rightfully any force in this case it would only be to enable the carrier to deliver a somewhat less or greater amount of corn than 38,600 pounds in fulfilment of the contract of shipment, and this variation must be within reasonable bounds. 15 Am. and Eng. Ency. of Law, 722; *Tilden v. Rosenthal*, 41 Ill. 385; 89 Am. Dec. 388; *Cabot v. Windsor*, 1 Allen (Mass.) 546; *Rantor v. Sala*, 35 Eng. Rep. (Moak) 518; *Rhodes v. Newhall*, 126 N. Y. 574; *Shichle et al. v. Chouteau*, 84 Mo. 161; 10 Mo. App. 241.

APPELLEE'S BRIEF, STEVENS & HORTON, ATTORNEYS.

A bill of lading serves two purposes. It is a contract for transportation and a receipt for goods, and in so far as it operates as a receipt, it is open to explanation and contradiction by parol proof. *Hutchinson on Carriers*, Sec. 125a; *Bissel v. Price*, 16 Ill. 412; *Great West. R. Co. v. McDonald*, 18 Ill. 172; *Shepherd v. Naylor*, 5 Gray 591; *Ellis v. Willard*, 9 N. Y. 529; *O'Brien v. Gilchrist*, 34 Me. 554; *Sears v. Wingate*, 3 Allen 103; *Wallace & Kingman v. Long*, 8 Brad. 504.

OPINION OF THE COURT, CARTWRIGHT, J.

Tyng, Hall & Co., of Peoria, Illinois, delivered to appellee at that place a quantity of corn for shipment to Custer City, Pa., and received from appellee a bill of lading for the same. The grain was shipped to the order of Tyng, Hall & Co. at Custer City, with directions to notify appellants. The bill of lading contained a column for the weight of the corn, at the top of which was the word "weight" and under that were the words "subject to corrections." In this column the weight of the corn was set down at 38,600 pounds. The grain was loaded into a car from the Central City Elevator at Peoria, and the weight was furnished by the weighmaster of the Board of Trade, whose weights were universally accepted by parties dealing in grain and by the railroad company. Tyng, Hall & Co. filled up a blank form of a bill of lading furnished them by appellee, inserting the weight so given, and the agent of appellee signed it. The car was sealed and forwarded to Custer City. Tyng, Hall & Co. drew a draft on appellants in favor of Peoria National Bank against the shipment, for \$246.18, which appellants paid and received the bill of lading. The car was received at Custer City in good order, with the seals unbroken, showing that no grain had been lost in transit. Appellants paid the freight on the amount of corn stated in the bill of lading, but the corn in the car when opened only weighed 24,264 pounds, a shortage of 14,336 pounds. Appellants brought this suit before a justice of the peace to recover for such shortage, and obtained judgment. On appeal to the Circuit Court, the case was tried by the court without a jury. The foregoing facts appeared and there was a finding and judgment for appellee.

The court held, in propositions of law submitted for the purpose, that as to the quantity of any article of shipment received, a bill of lading issued by a carrier is to be treated as a receipt, and subject to explanation in that respect; that the carrier may make such explanation against an assignee for value whenever the bill of lading, taken as a whole, shows that the carrier does not vouch for the correctness of the

written statement of the quantity received, and, that in view of the language used in the printed portion of the bill of lading in question, which stated that the weight was subject to correction, and that the contents were unknown, it was competent for the defendant to show the quantity of corn received for shipment, and it was not liable for more than was actually received.

Bills of lading are constantly used by shippers to obtain advances upon their shipments, and it is to be expected by the carrier that such use will be made of them, and that advances will be made upon the faith that the property described in them is in the possession of the carrier, and will be delivered to the holder of the bills of lading. Those trusting in them and relying upon their truth, do only what the carrier has every reason to expect will be done. Such use is a material aid to traffic and business, and is to be recognized as an important and useful factor in the stock and grain business of the country. Appellants paid the draft in this instance, relying upon the representations of appellee made in the bill of lading, and they paid the freight charges exacted from them on the 38,600 pounds named in the bill, before they had any means of knowing that less than two-thirds of that amount was in the car. Appellants having advanced money on the faith of the bill of lading, it would be a fraud upon them to permit appellee to escape liability by showing that its statements therein contained were false. *St. L. & I. M. R. R. Co. v. Larned*, 103 Ill. 293. So far as appellants are concerned, appellee must be bound by the terms of its contract.

The bill of lading used was a general blank form for shipping all sorts of freight, and contained in parenthesis the words "Contents and value unknown," evidently intended to apply to packages therein mentioned, the contents of which were concealed from view. It could not apply to corn in bulk loaded into a car from an elevator. Appellee did not intend to say by its bill of lading, that it had received 38,600 pounds of corn, the contents of which were unknown, and it would not be so understood.

So far as the provision, that weight was subject to correction is concerned, a reasonable interpretation must be given to it, such as both parties would naturally give when the shipment was made. Errors and mistakes are liable to occur in weighing grain, as in other things, and the right to correct such errors was reserved in the contract. Appellants had notice of that provision, and anything attributable to such ordinary errors and differences in weighing as might be reasonably expected to occur, might be corrected, but the right must be kept within the reasonable limits of such errors. Appellants, when advancing money on appellee's statement that it had 38,600 pounds of corn, to which they would get title by acquiring the bill of lading, would certainly not anticipate, under the provision for correcting errors in weighing, such an unreasonable difference in weight, not attributable to ordinary errors of that sort, as would amount to 256 bushels in a car load of corn. Such a difference would be apparent to sight, and it would require no test of weighing to show that it existed. Appellee would have no right, under cover of correction of errors in weighing, to account for such a difference as could arise only from gross negligence of its agent. Such obvious difference could not be charged to errors not plainly apparent, and merely due to mistakes in weighing, which would be discovered on again weighing the corn. If appellee could reduce the amount of corn more than one-third, there would be no limit to the correcting that might be done. In our opinion, the holding of the court that appellee could not be made liable for more than the amount of corn delivered, was erroneous.

It was provided in the bill of lading that in the event of the loss of any property for which the carrier might be responsible, the value and cost of the same at the point and time of shipment should govern in the settlement for the same, and it is argued that the judgment should not be reversed, because the evidence for appellants related to the value of corn at Custer City, and no evidence was offered of value at Peoria. On the other hand it is claimed that this clause was inoperative as an attempt to limit a common law

Nullmeyer v. Nullmeyer.

liability. We do not regard the provision as a limitation of liability as a carrier, and see no reason why it should not be binding on a shipper, if understood and assented to by him. Whether he does so understand and assent is a matter of evidence and a question of fact. *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Field v. C. & R. I. R. R. Co.*, 71 Ill. 458.

But this provision was apparently intended to apply to a loss of goods in transit, and we do not regard it as applicable to a case where, as in this instance, the carrier takes and keeps the freight charges for carrying corn a long distance to its destination.

Appellants paid twenty-nine cents per hundred pounds for carrying this amount of 14,336 pounds of corn to Custer City, which was required before the car could be opened, and appellee then assumed to deliver the corn there. This represented a large difference in value between the two places, and it would not be just that appellee should retain that difference and insist upon the clause in the bill of lading.

That would make the provision an agreement that appellants should only be compensated for a part of the damages.

The judgment will be reversed and the cause remanded.

John Nullmeyer v. Fredricka Nullmeyer.

1. *Divorce Proceedings—Evidence Must Support the Decree.*—Where, in a proceeding for divorce, the cause is submitted to a jury, the evidence must be sufficient to support the verdict, or a decree based upon it will be set aside.

2. *Divorce—Cruelty—Condonation.*—Acts of cruelty, considered as a cause for divorce, may be condoned. *So held* where the only acts complained of as grounds of divorce, were two, between 1874 and 1875, another in 1882, and an accusation of adultery in 1886, the parties continuing to live together as husband and wife in a peaceable and contented way for over four months after the accusation of adultery was made, when the wife abandoned the husband without any new cause.

3. *Divorce—Accusation of Unchastity in Connection with Acts of Cruelty.*—In a proceeding for divorce, it was shown in connection with some acts of cruelty, that the husband had accused his wife of adultery. The court refused to allow him to show what cause his wife had given

him to suspect her of unchastity. *This was held error*, because it might have explained the animus of the charge of adultery and show that it was not maliciously made, and might possibly show that the accusation was true.

4. *Divorce—Delay in Separation — Condonation.*—Where delay in separation has occurred, the party bringing the suit must in some way account for such delay, for, in the absence of the explanation, the court ought not to be called upon to relieve a party of that which his own conduct has shown to be not grievous to him.

5. *Condonation—Revival of Former Course of Action.*—Evidence of an unjustifiable act of cruelty in 1874, followed by cohabitation for six months, and another act of cruelty, under considerable provocation, followed by peaceful cohabitation till 1882, when defendant threatened to shoot complainant if she disobeyed his request not to go to a dance, which she did, and left him for six months, returning to him and abiding with him till 1886. In 1886 he accused her of adultery, after which she lived with him for months before leaving him. *It was held*, that such action was insufficient to support a decree of divorce for cruelty, and should be such condonation as to bar a suit. *It was held also*, that the latter accusation did not renew the former acts of cruelty.

Memorandum.—Suit for divorce. Appeal from a decree rendered by the Circuit Court of Peoria County; the Hon. N. E. WORTHINGTON, Judge, presiding. Heard in this court at the May term, A. D. 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, PAGE & PUTERBAUGH, ATTORNEYS.

“When delays occur, it must in some way be accounted for, because in the absence of explanation the court should not be called on to meddle with what the complaining party showed, by his conduct through a considerable series of years, to be to him no grievance.” Bishop on Marriage and Divorce, Vol. 2, Sec. 205; *Fellows v. Fellows*, 8 N. H. 160; *Hutchins v. Hutchins*, (Ill.), 29 N. E. Rep. 888; *Youngs v. Youngs*, 130 Ill. 230.

It must appear that at the time complainant filed her bill, she had reasonable ground to apprehend a repetition of such offenses in the future. Courts do not grant divorces on the ground of cruel treatment as a punishment of offenses long since committed. Newell's Sackett's Instructions, p. 175, Sec. 19.

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It is only competent to show false charges of unchastity in connection with acts of cruelty, to characterize those acts, but under no circumstances are they grounds for divorce. *Ward v. Ward*, 103 Ill. 477.

APPELLEE'S BRIEF, GEORGE B. FOSTER, ATTORNEY.

Condonation is defined in the books, as forgiveness upon condition the injury shall not be repeated, and is dependent upon future good usage and conjugal kindness. *Bishop on Marriage and Divorce*, Sec. 370.

But condonation is always accompanied, not only with the implied condition that the injury shall not be repeated, but also that the offending party will ever thereafter treat the other with conjugal kindness. *Davis v. Davis*, 19 Ill. 334.

The facts proven in this case constitute a clear breach of the condition of kind treatment implied in every act of condonation.

Appellee could justly conclude the abusive language would be followed, as on former occasions, with personal violence. *Farnham v. Farnham*, 73 Ill. 497.

OPINION OF THE COURT, LACEY J.

This was a bill filed in the Peoria Circuit Court by appellee against appellant, for divorce. The bill charged that the parties were intermarried in January, 1874, and for grounds of divorce it alleged that shortly after the said marriage the appellant commenced ill-treating the appellee and continued such ill-treatment up to about March 29, 1887, during which said period the appellant was guilty of extreme and repeated cruelty; that he frequently struck her, choked her and threatened to shoot her, and that by reason of his extreme and repeated cruelty to her she was compelled, on the day and year last aforesaid, or about that time, to leave said appellant. The appellant answered, denying the charges of the bill. The cause was submitted to a trial before a jury and resulted in the jury rendering a verdict against the appellant, whereupon he moved the court to set aside the verdict and grant a new trial, but the court denied

the motion and rendered a decree, and from that decree this appeal is taken. The main ground insisted upon in this court for a reversal is that the evidence is not sufficient to sustain the verdict. We have examined the evidence carefully and have come to the conclusion that the appellant's complaint is just, and that the evidence is insufficient to sustain the verdict. The substance of the proof is that the appellee and appellant were married in 1874; that about six months thereafter upon an occasion of his being locked out of the house at night, appellant broke in the door and caught his wife by the throat, and with a hatchet in his hand threatened to kill her if she ever locked him out again; no other assault was ever made upon her by him except about six months after that he threw his crutch at her, because she cut the hose when he was trying to bathe his leg for rheumatism, thus preventing him from doing so; and in about seven years thereafter, in 1882, he drew a revolver on her and threatened to shoot her and the man she danced with, if she went to a certain dance; she went, notwithstanding his objections, and after the dance left him for a day and refused to come home. But she came back, however, and they lived together as man and wife until 1886, when she again left him for about three weeks for accusing her with committing adultery with one Anderson, and then came back to him and they lived together as man and wife until in March, 1887. About four months after she had returned to him, she again finally abandoned him for no cause shown. We think the main cause of complaint and ground for divorce had been condoned after the parties had lived together for so long a time. There were but one or two acts of cruelty, that of throwing the hatchet and crutch, and the throwing of the latter was under considerable provocation. What could be more contemptible, mean and spiteful than for a woman to cut the hose while her husband was trying to alleviate his suffering while bathing his leg. But the acts of cruelty, whatever they might amount to, were condoned by the parties living together until 1886. The drawing of the pistol was not an assault, but simply a threat, and the charge of

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adultery seems to have been made under considerable provocation. The appellee disobeyed her husband and went with male company that he did not like to have her go with, and the evidence shows that Mr. Anderson was a very frequent visitor, coming there nearly every day while appellant was sick, so much so as to arouse his suspicions. The appellant was no doubt jealous on account of these unwelcome attentions to his family by Anderson, but whether he had cause for it is not shown.

We think, however, the court should have permitted the appellant to show what cause appellee had given him to suspect her of unchastity. It might explain the animus of the charge of adultery and show that it was not maliciously made, and might possibly show that it was true. On the question of condonation, Bishop lays down in his work on Marriage and Divorce, Vol. 2, Sec. 342, the following rule of law, to wit: "It is unquestionably sound American law, that under many circumstances the complainant must in some way satisfy the court in respect to his delay or he can not have the divorce he prays." The same author in Sec. 105 says: "When delays occur it must in some way be accounted for, because in the absence of explanation the court should not be called on to meddle with what the complaining party showed, by his conduct through a considerable series of years, to be to him no grievance." See also *Youngs v. Youngs*, 130 Ill. 230; *Hutchins v. Hutchins* (Ill.), 29 N. E. Rep. 888. In the case before us the only acts complained of for grounds of divorce were two between 1874 and 1875, and the third in 1882; then the charge of adultery in 1886, and after this last charge appellant and appellee continued to live together as man and wife in a peaceable and contented way for over four months, when the appellee abandoned her husband without any new cause. We think the evidence entirely too weak to sustain the charges of the bill. The jury, we think, were not justified in finding the verdict in favor of appellee; the court should have granted a new trial. For refusing to do so, the decree is reversed and the cause remanded.

Dickison v. Garland.

1. *Pleading—Sufficiency of Assets to Pay Claims, etc.*—A plea of sufficient assets in the hands of the executor to pay the debts, by an heir and legatee of the deceased person, to an action brought against him for a breach of a covenant for title in a deed of real property, executed by his deceased ancestor, and delivered to the plaintiff in the suit which simply shows that after paying all debts, legacies, and expenses of administration, there remained in the hands of the executor \$6,000, which might have been applied to the payment of claims sued on, is not a sufficient plea, where the claim in suit did not accrue until the plaintiff had been evicted from the property, causing the damages sought to be recovered, and after the estate had been settled and the assets distributed.

2. *Pleadings—Riens Per Descent.*—Under the statute of frauds and perjuries a plea of *riens per descent* by an heir and devisee in an action of covenant, which fails to negative the charge in the declaration that there were lands devised to him, though sufficient at common law, where the action could be maintained only against the heir who received land from the ancestor by descent, is not sufficient under Secs. 12 and 13 of Chap. 59, R. S., entitled "Frauds and Perjuries."

3. *Practice—Abiding by a Plea—Writ of Inquiry.*—In an action against the devisees and heirs of a deceased person upon a covenant for title, in a deed of real property executed by the common ancestor, the defendants filed pleas of *riens per descent*, of *plene administravit* and of sufficient assets in the hands of the executor, to which demurrers were sustained and the defendants abided by their pleas. *It was held* that the court would have been justified in giving judgment against the defendants without any writ of inquiry of the lands, tenements or hereditaments, or rents and profits out of the same descended or devised, under Sec. 13 of Chap. 59, R. S., entitled "Frauds and Perjuries."

4. *Practice—Effect of Not Denying Facts Alleged.*—All facts alleged and not denied by a plea are admitted the same as though a default were taken.

Memorandum.—Action of covenant. Appeal from a judgment rendered by the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, McCULLOCH & McCULLOCH AND ARTHUR KEITHLEY, ATTORNEYS.

At common law an action was given against the heir in order to charge the lands coming to him by inheritance for

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certain classes of debts of his ancestor, but such action did not charge him personally. It was a proceeding very similar to that which is now given against an administrator to charge the personal assets of the deceased with his debts, or it might be likened to a *scire facias* to revive a judgment against a deceased debtor in order to obtain execution against his lands. But it was essential to the action that lands should have come to the heir by inheritance, and not any other way. Rawle on Covenants for Title, 586; 2 Lomax on Executors, 404; Vansyckle v. Richardson, 13 Ill. 171; Ryan v. Jones, 15 Ill. 1.

It was also essential that the lands should have remained in the hands of the heir at the time of the commencement of the action; for if he had aliened them before suit brought the creditor was without remedy. Davy v. Pepys, Plowd. 439; Buckley v. Nightingale, 1 Str. 665; Rawle on Covenants, 589; 2 Lomax on Executors, 241; 1 Cruise's Digest, 57 and notes; Wilson v. Knubley, 7 East, 128; Bailey v. Ekins, 7 Ves. 319.

Without having acquired a legal estate by inheritance from his ancestor, the heir was not liable for a breach of covenant occurring after the death of the ancestor. 1 Chitty's Pleading, 53; Plunkett v. Penson, 2 Atk. 294.

Therefore if the ancestor had devised all his lands by his will no action could have been maintained against either the heir or devisee. Rawle on Covenants, 594; Plasket v. Beeby, 4 East, 491; 2 Leading Cases in Eq. 293.

APPELLEE'S BRIEF, DANIEL F. RAUM, ATTORNEY.

No cause of action accrued to appellee until a breach of the covenants by eviction, and recovery of damages, which was long after the final order for distribution of the fund in the hands of the executor of Griffith Dickison was made. The claim was not one that could have been filed against the estate within two years from the granting of letters testamentary. Bridgeford et al. v. Riddell et al., 55 Ill. 269; Dugger et al. v. Oglesby, 99 Ill. 405.

In joint actions under the statute the executor or admin-

istrator may insist upon this limitation of two years; and if he does so successfully, the plaintiff must take judgment against him to be satisfied out of newly discovered estate. But heirs and devisees can not rely upon this limitation. They may insist upon the general statute of limitations, and, if successful, may wholly defeat a recovery against them. *Ryan v. Jones*, 15 Ill. 1; *Dugger et al. v. Oglesby*, 99 Ill. 405.

OPINION OF THE COURT, LACEY, J.

This suit was brought by the appellee, in an action of covenant against the appellants, the only heirs of Griffith Dickison, deceased, who are devisees of lands, by his last will and testament duly proven. The foundation of the action is a warranty deed, executed by the deceased to the appellee, for certain real estate therein described. The appellee avers in his declaration that the deceased, Griffith Dickison, was not seized of the real estate mentioned, in that it was incumbered, and that he could not enjoy the possession of the same by virtue of the deed; that Margaret C. Dickison had a right of dower in the land and still had it, and by decree of the Circuit Court of Peoria County, August 19, 1889, appellee was evicted from a portion of the premises, to wit, twenty-five rods off of the west side of the forty, by eighty rods long; claims for costs paid to Margaret C. Dickison, spent in endeavoring to defend the suit, and damages paid to Margaret C. Dickison. By an amendment of the declaration it was averred that Wm. B. Dickison was appointed executor of the last will and testament of Griffith Dickison, deceased.

It appears that John A. Dickison and Wm. B. Dickison, two of the defendants, filed pleas of *non est factum*, and eleven other pleas, and Wm. B. Dickison, executor, filed a plea of *plene administravit*.

The court sustained a demurrer to the second, third, fourth, fifth, sixth, eighth and eleventh, and overruled it as to the tenth plea, and John A. Dickison abided by his pleas. The court sustained a demurrer also, to the second, third,

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fourth, fifth, eighth and tenth, and overruled it as to the seventh of the pleas, filed by Wm. B. Dickison. He also abided by his pleas. Fred Dickison, a minor, filed a plea of *non est factum*, by his guardian. There was a trial by a jury and verdict and judgment for \$952.70, in favor of the appellee.

The third plea by John A. Dickison is attempted to be a plea of sufficient assets remaining in hands of executor to pay all the debts, but it fails to amount to that, and does not contain the necessary averments. It simply shows that after paying all debts and legacies and expenses of administration for which the estate of the deceased, Griffith Dickison, was liable, there remained in the hands of the executor \$6,000, which might have been applied to the payment of the claims sued on. But that was not a sufficient plea. The claim in suit did not accrue until after the appellee was evicted from the land, thereby causing the damages complained of, and long after the estate was completely settled and all the assets distributed, amounting to \$1,000 each to all deceased's heirs, except two who were not entitled under the will to any share of the personal estate.

Therefore, the personal assets of the deceased, shown in the plea, were not available in the hands of the executor for the payment of appellee's claim at the time of the commencement of the suit, and these facts so appeared from the allegations of the declaration.

The statute provides that all demands against an estate not exhibited to the County Court within two years of the granting of letters of administration, shall be forever barred, except as to subsequently discovered estate not inventoried or accounted for by the executor or administrator.

The plea then failed to show a defense; failed to negative the existence of facts upon which such a plea, to make it good, should be based. This has been fully held in the case of *Dugger et al. v. Oglesby*, 99 Ill. 405.

The pleas of *riens per descent* were not good, as they failed to negative the charge in the declaration that there were lands devised by Griffith Dickison, deceased, to the defend-

ants. These pleas may have been good at common law, where this kind of an action could not be maintained by the creditor of an ancestor against his heirs, except against those who received their lands by descent.

The pleas attempt to answer the whole declaration, but as they were drawn they were wholly immaterial. This objection applies to the fifth plea, as well as to all similar ones. The complaint that the court found facts that the jury ought to have found is not well taken.

The special pleas of the defendant having been demurred to, and the demurrer sustained, there were no issues on any of the pleas of *riens per descent*, *plene administravit* or sufficient assets in hands of executor or other special pleas, and the court would have been justified in giving judgment on the verdict against the defendants, without any writ to inquire of the lands, tenements or hereditaments or rents and profits out of the same, descended or devised under section 13, chapter 59, R. S., entitled Frauds and Perjuries, for all facts not denied by plea are admitted the same as though default were taken.

The court, however, did, in substance, without a writ of inquiry, limit the recovery against each defendant to the value or less, of the land descended to them or either of them.

The judgment appears to be in the form of the one in a similar case approved by the Supreme Court in *Dugger et al. v. Oglesby*, *supra*. The claim in this case seems to be a just one, and the right of recovery sanctioned by our statute. Only the merest technicalities are interposed to sustain a reversal.

We find none of the objections made of sufficient importance to justify it. The judgment of the court below is affirmed.

Fort Clark Street Railroad v. Ebaugh.

1. *Railroad Companies—Right to Expel Passengers for Violating Rules.*—A street car company has the right to require of passengers the observance of all reasonable rules tending to promote the safety and con-

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venience of passengers and the successful conduct of its business. So long as a passenger observes such rules the company is bound to carry him; but when he wantonly refuses to obey them, the company has the right at once to expel him, using no more force than may be necessary for that purpose.

2. *Railroad Companies—Rules and Regulations—Notice.*—Where a street car company has adopted a rule against passengers riding on the platform, a request by the conductor that persons violating the rule shall come inside the car, in observance of the rule, should be complied with whether the person had notice of the rule or not. The conductor should have control of his car with the right to enforce all needed regulations and all reasonable requests made by him, with that end in view, should be obeyed by the passengers.

Memorandum.—Action in case. Judgment for plaintiff. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

STATEMENT OF THE CASE.

The plaintiff got upon defendant's electric car, to ride a dozen or twenty blocks. The seats in the car were full, and the plaintiff stood on the platform of the car. There was an abundance of standing room inside, and the conductor, in obedience to a rule of the company, asked him to go inside. This request was repeated several times, and he as often refused, saying, he did not want to go inside, and that he would not go inside. The car was then stopped and he again invited to go in or get off, and was told the car would wait for him, when he got off the car and walked away. He brought suit against the company, for ejecting him from the car, and recovered \$80. The company appealed.

APPELLANT'S BRIEF, W. W. WELLS, ATTORNEY.

A railway company has clearly the right to require of passengers the observance of all such reasonable rules as tend to promote the comfort, safety and convenience of the passengers, to preserve good order and to secure the safety of the train, and to enable the company to conduct its business as a common carrier, with advantage to the public and to itself. So long as such reasonable rules are observed by a passen-

ger the company is bound to carry him, but if they are wantonly disregarded, the obligation ceases, and the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place. This is a common law right, arising from the nature of the contract and occupation as common carrier. *Illinois C. Ry. v. Whittemore*, 43 Ill. 420; *Chicago & A. R. R. v. Milland*, 31 Ill. App. 435.

IRWIN & SLEMMONS, attorneys for appellee.

OPINION OF THE COURT, HARKER, P. J.

This is an action in case brought by appellee to recover damages for being ejected from one of appellant's street cars, after he had taken passage thereon. A trial resulted in a verdict and judgment for \$90.

The evidence shows that appellee took passage on one of appellant's electric cars at a time when all the seats inside the car were occupied, but when there was plenty of standing room within and the aisle was clear. He, with three others, took position on the rear platform, when they were requested by the conductor to go inside. It was against the rules of the company to allow passengers to ride on the rear platform. The others passed in, but appellee refused. He was several times so requested by the conductor, but each time refused and persisted in standing on the platform. At length the conductor told him he must either go in the car or get off, and refused to go further with the car until appellee should comply. Appellee then left the car, no violence being used toward him. The conductor did not lay his hands upon him or offer to do so.

It is difficult for us to understand upon what theory the plaintiff is entitled to damages. The rule which he refused to comply with and because of the enforcement of which he was denied passage on the car was established for the safety of passengers and the convenience of employes operating the car. It was a reasonable and proper rule.

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He saw fit to stand out in defiance of it, evidently from sheer stubbornness, or to invite an assault from the conductor. A street car company has the right to require of passengers the observance of all reasonable rules tending to promote the safety and convenience of passengers and the successful conduct of its business. So long as a passenger observes such rules, the company is bound to carry him; but when he wantonly refuses to obey them, the company has the right at once to expel him, using no more force than may be necessary for that purpose.

Appellee contends that he had not sufficient knowledge of the rule. We do not think it was necessary for the conductor to have exhibited a rule, or told appellee in terms that the company had adopted such a one.

The request of the conductor was reasonable, made in observance of the rule, and it was the duty of appellee to comply, instead of standing out against it with childish obstinacy, as he did. The conductor should have control of his car with the right to enforce all needed regulations, and all reasonable requests made by him with that end in view, should be obeyed by passengers.

The judgment will be reversed, and inasmuch as we find that the facts are such that the plaintiff has no cause of action, the cause will not be remanded.

The Coal Run Coal Company v. Giles.

1. *Evidence—Admissibility Under Allegations of the Declaration.*—Under a declaration charging that dirt, waste coal, waste material and other refuse matter from the coal shaft were deposited either directly or through the agency of a stream upon the plaintiff's land, rendering it unfit for cultivation or tillable purposes, evidence of damages by water occasioned by the obstruction of the channel of the stream by the coal so as to flood his land and destroy crops by the action of the water, is inadmissible.

2. *Evidence—Admissibility Under Allegations of the Declaration.*—Under a declaration charging that the defendant occupied the premises

and operated a mine, *it was held*, that the plaintiff could not recover for an injury sustained by him from the wrongful acts of the defendant's tenants.

3. *Pleading—Liability for the Wrongful Acts of Lessees.*—Under proper pleadings a person may be made liable if he leases premises with a coal washer built upon them in such a way that its operation may inflict injury upon the premises of another, such leasing being made with the knowledge that it would be used by the tenant and results would naturally follow the proper use of it, the injury in such a case being the result of the prosecution of the business for the continuance of which the lessor would receive rent as a consideration.

Memorandum.—Action on the case. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, BREWER & STRAWN, ATTORNEYS.

The court below erred in admitting evidence of damages done by water. The charge is rendering the soil unfit for cultivation by deposits of slack, and not drowning out the crops. The pleadings and proof must correspond, and plaintiff can only recover on the case made by the declaration. *Guest v. Reynolds*, 68 Ill. 478; *T. W. & W. R. R. Co. v. Morgan*, 72 Ill. 155; *Ayers v. Chicago*, 111 Ill. 406; *Disbrow v. C. & N. W. Ry. Co.*, 70 Ill. 246; *Ill. Central R. R. Co. v. McKee*, 43 Ill. 119; *Springfield v. Griffith*, 21 Ill. App. 93; *Consolidated Coal Co. v. Yung*, 24 Ill. App. 255; *C., B. & Q. R. R. Co. v. Morkenstein*, 24 Ill. App. 128.

The general rule is, the owner of premises in possession of the lessee is not liable to a third person for an injury caused by want of repair. *Prima facie*, the tenant is bound to repair and is therefore liable. *Gridley v. Bloomington*, 68 Ill. 47; *Union B. Mfg. Co. v. Lindsay*, 10 Brad. 583; *Samuelson v. Cleveland Im. Co.*, 49 Mich. 164, 173; *Leonard v. Storer*, 115 Mass. 86.

So the owner is not liable when the premises are in possession and control of a contractor. *Taylor on Landlord and Tenant*, Sec. 175, note 2 (8th Ed.).

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Or where the owner has parted with possession under a contract to sell. *Earle v. Hall*, 2 Metc. 353.

The lessor is not liable where the use of the premises unnecessarily causes the nuisance. *Taylor on Landlord and Tenant*, Sec. 175 *et seq.*, p. 193, 196; *Shindelbeck v. Moon*, 32 Ohio St. 264 (ice from waste pipe); *Leonard v. Storer*, 115 Mass. 86 (ice from a steep roof); *Gridley v. Bloomington*, 68 Ill. 47 (cover in sidewalk); *Handyside v. Powers*, 145 Mass. 123 (elevator accident); *Sinton v. Butler*, 40 O. St. 158 (elevator accident); *Moor v. L. I. S. Co.*, 7 Atl. Rep. 198 (open hole dug by tenant); *Schott v. Harvey*, 105 Pa. St. 222 (statute requiring fire escapes); *Keely v. O'Conner*, 106 Pa. St. 321 (fire escape); *Lee v. Smith*, 42 O. St. 458 (fire escape); *Mayer v. Corleis*, 2 Sandf. 301 (waste water in street); *Ryan v. Wilson*, 87 N. Y. 471 (shaft in laundry); *Ray on Negligence of Imposed Duties*, pp. 50, 52, 66, 67; *Wood on Nuisance*, 78, 141.

APPELLEE'S BRIEF, BLAKE & KELLY, ATTORNEYS.

Where the premises are leased with the nuisance upon them, the authorities hold that the owner, the lessor, and not the tenant, would be responsible for injuries that might be occasioned by the nuisance. *Gridley v. Bloomington*, 68 Ill. 47; *City of Peoria v. Simpson*, 110 Ill. 300; *Stephani v. Brown*, 40 Ill. 428; *The Pennsylvania Co. et al. v. Ellett, Adm'r*, 132 Ill. 654.

OPINION OF THE COURT, CARTWRIGHT, J.

Appellee brought this suit against appellant, and obtained a verdict for \$600, from which \$300 was remitted, and judgment was entered for \$300 and costs.

The declaration contained two counts. The first count charged in substance that defendant occupied and possessed a tract of land upon which it operated and controlled a coal shaft, or mine, wherein it mined large quantities of coal adjacent to lands in the lawful possession of plaintiff; that a running stream of water, naturally clear and fit for domestic purposes, and stock use, flowed through defend-

ant's tract upon and across plaintiff's land; that in the operation of the coal shaft or mine by defendant large quantities of dirt, waste coal and other waste material and refuse matter were taken out of said shaft or mine, and deposited by or through the acts of defendant in said stream and carried a short distance and deposited on plaintiff's land, whereby large portions thereof were rendered unfit for cultivation or tillable purposes, and the waters of the stream were rendered unfit for domestic purposes and stock use, and that plaintiff was thereby damaged in compelling him to spend a large portion of his time procuring water for his stock.

- The second count alleged that plaintiff was in possession of said land occupied by him as tenant, and contained the same averments as the first count concerning the operation of the coal shaft, or mine, by defendant, and the removal therefrom of coal and other material. It charged that defendant deposited, or caused to be deposited, a large amount of said dirt, waste coal, waste material and other refuse matter on the land so occupied by plaintiff, covering a large amount of plaintiff's land, rendering it unfit for cultivation or tillable purposes. This count contains no reference to any stream of water.

On the trial, plaintiff introduced evidence tending to prove that the coal shaft was about forty rods from his land, and nearly as far from the creek; that defendant commenced to build a washer for washing coal at the shaft in the fall of 1889, and when completed used it for such purpose, in consequence of which the water used in washing, containing sulphur and sediment, passed along a ditch into the creek, and that in the following June there was a freshet, and coal was brought down the creek so that it filled the channel and spread upon portions of his land. He was then permitted to testify, against the objection of defendant, to damage by water occasioned by the obstruction of the channel by the coal so as to flood his land and destroy his crops by the action of water. It was not alleged in the declaration that defendant had inflicted an injury of that kind upon

him, but his right to recover, so far as injury to his land was concerned, was based on the charge that dirt, waste coal, waste material and other refuse matter from the shaft were deposited, either directly, or through the agency of the stream, upon his land, rendering it unfit for cultivation or tillable purposes. It was therefore error to admit proof of the claim which was not made by the declaration. *Guest v. Reynolds*, 68 Ill. 478; *Ayers v. Chicago*, 111 Ill. 406; *T. W. & W. Ry. Co. v. Morgan*, 72 Ill. 155; *C., B. & Q. R. R. Co. v. Dickson*, 143 Ill. 368.

Plaintiff testified to damages that he claimed to have suffered, from the spring of 1890, up to the commencement of the suit, in the summer of 1892, consequent upon the continued use of the washer and operation of the mine. The evidence for the defendant was that there was a strike of miners, in consequence of which the mine was not operated at all from April 30 to August 1, 1890, when it was leased to other parties, and that defendant had nothing to do with the operation of the mine, the washing of coal, or the pumping of water, after August 1, 1890. The declaration in each count charged that defendant occupied the premises and operated the mine, and it was necessary to prove the nature of the defendant's liability, as laid. *Gridley v. City of Bloomington*, 68 Ill. 47. Under the declaration plaintiff could not recover for any injury sustained from acts of lessees.

The third instruction given for plaintiff was to the effect that plaintiff was entitled to recover damages for any dirt, waste coal and waste material deposited in the creek by defendant's lessees in the operation of its coal mine and carried by the waters of the creek upon the land of plaintiff, injuring his crops or rendering the land untillable. This instruction should not have been given. The defendant's eleventh instruction was refused. It stated the rule correctly as to defendant's liability in this action for damages occasioned by acts of lessees, and should have been given.

Under proper pleadings the defendant might be made lia-

ble, if it leased the premises with the washer built upon them in such a way that its operation would inflict injury on plaintiff's premises, and with the object of having it used by the tenant, when such results would naturally follow in the proper use of it. Such an injury would result from the prosecution of a business for the continuance of which the defendant would receive rent as a consideration. *Stephani v. Brown*, 40 Ill. 428. But the declaration was not framed to recover for such a cause. The evidence showed that the bulk of the waste carried to plaintiff's land was not deposited in the ditch or creek, but was washed there by freshets from a place of deposit on defendant's land; and in no event could defendant be made liable, merely from its relation as landlord, for the improper and negligent deposit of waste on the premises, by its tenant, in such a way that freshets would carry it upon the plaintiff's land.

The judgment will be reversed and the cause remanded.

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Barrows v. The City of Sycamore.

1. *Pleading — Sufficiency of Declaration.*—In an action against a city for erecting a water tower near the plaintiff's premises, a declaration which charged that the tower was dangerous and liable to fall, but did not show by proper averments any negligence or improper construction of it, or even a weakness of it, or that there was any defect in the material out of which it was constructed, or why it was likely to fall, is insufficient, and a demurrer to it was held to have been properly sustained.

2. *Cities and Villages — Damnum Absque Injuria.*—Where a city erected a water tower in a street, which the plaintiff alleged to be unsightly and cast a shadow upon her premises, *it was held*, that the mere fact that her property had depreciated in value by reason of the proximity of the water tower was not ground for action, as the damages arising from the causes alleged are *damnum absque injuria*.

3. *Cities and Villages — Control of Streets.*—Under our statute cities are given exclusive control of all streets and alleys within the corporate limits. The fee of the streets is in the corporation, and the dominion over them is as absolute as that of the owner of his lands.

Barrows v. City of Sycamore.

Memorandum.—Action on the case. Appeal from the Circuit Court of De Kalb County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, JONES & ROGERS, ATTORNEYS.

If the market value of plaintiff's property is greatly depreciated on account of the construction and erection of this structure in a public street so near to said property as these pleadings aver, then there is a damage. In fact, the essential element of damage to property consists in the depreciation of the market value thereof. *Stockton v. City of Chicago*, 136 Ill. 434; *Springer v. City of Chicago*, 135 Ill. 560; *Chicago, B. & N. R. R. Co. v. Bowman et al.*, 122 Ill. 595; *Chicago, P. & St. L. R. R. Co. v. Leah*, 41 Ill. App. 589.

APPELLEE'S BRIEF, CARNES & DUNTON, ATTORNEYS.

Under our statutes cities are given exclusive control of all streets and alleys within the corporate limits. The fee of the streets is in the corporation, and the dominion over them is as absolute as that of the owner of other lands. *Chicago & V. R. R. Co. v. People*, 92 Ill. 170.

"Under the power of exclusive control over streets it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of, streets which is not incompatible with the ends for which streets are established; and that it is a legitimate use of a street to allow a railroad track to be laid down in it. *Moses v. P., Ft. W. & C. R. R. Co.*, 21 Ill. 522; *Murphy v. Chicago*, 29 Ill. 279; *Chicago & North Western Ry. Co. v. Elgin*, 91 Ill. 251." Quoted from *City of Quincy v. Bull*, 106 Ill. 337.

Water is a prime necessity, and in densely populated districts can not be obtained from the soil without damage to health. A supply of pure water therefore becomes a matter

of public concern, and its distribution by public authorities by means of pipes laid in the public streets is an ancient and universal custom. Such a supply is not only requisite to the public health, but for the public safety as well, in order to afford the means of extinguishing fires and prevent conflagrations, and may even be connected with the use of the street for travel, when used for sprinkling. Such a use of urban streets is proper and legitimate. Lewis on Eminent Domain, Sec. 128.

For any act obstructing a public and common right no private action will lie for damages of the same kind as those sustained by the general public. *City of Chicago v. Union Bldg. Association*, 102 Ill. 379; *City of E. St. Louis v. O'Flynn*, 119 Ill. 300.

OPINION OF THE COURT, LACEY, J.

This was an action on the case brought by the appellant against appellee, to recover damages to her residence and hotel buildings on a lot owned by her for some time before the building of the structure complained of, by reason of the wrongful erection of a stand pipe and water tower within fifty-six and one-half feet from the hotel building and near her dwelling.

The declaration consists of four counts, to each of which the appellee demurred, and the court sustained the demurrer, and the appellant abiding her declaration, the court gave judgment against the appellant for costs.

From this judgment, this appeal is taken.

This brings up the question of the sufficiency of the declaration. It consists of four counts, and in substance makes the following charges, to wit: The first count charges and avers that the stand pipe or water tower was wrongfully constructed in the public streets of appellee, and was one hundred and thirty-five feet high, and situated fifty-six and one-half feet from the hotel; that it is of five feet in height, steel and iron plates riveted together, the first course of plates being nine-sixteenths of an inch in thickness, diminishing toward the top of the stand pipe to three-sixteenths

Barrows v. City of Sycamore.

of an inch, and capable of holding about 179,000 gallons of water; that by reason of the fact that the water tower causes constant apprehension that it may fall over on the hotel building and by its great weight destroy it, or that it might blow over on the property or burst and flood the same, greatly depreciates its value for hotel and residence purposes, and especially its market value, and claims damages to the amount of \$3,000. The second and third counts are essentially the same as the first, and the fourth count charges that on account of the great height of the tower, it obstructs the light of the hotel building, and especially the parlor and sitting-room, in the southwest corner thereof, and obstructs the view of the hotel building, casts a shadow upon it and makes its appearance unsightly, and otherwise injuriously affects the premises, and makes the premises less convenient and comfortable for residence and hotel purposes.

We are of the opinion that the court below decided the questions raised by the demurrer correctly. While the counts, or some of them, charge that the tower was dangerous and liable to fall, none of them show, by averments, any negligence or improper construction of it, by appellee, or even a weakness of it, or that there was any defect in the material out of which it was constructed, or why it was likely to fall. The averments are mere conclusions, unwarranted by anything contained in the declaration, except that the tower was high. This is not sufficient. As to fourth count, neither unsightliness nor casting a shadow thereby, causing damages, is ground for recovery. The mere fact that the property was depreciated in value, is not ground for action. The damages arising from the causes alleged are what in law are called *damnum absque injuria*.

The Supreme Court says that "under our statute cities are given exclusive control of all streets and alleys within the corporate limits. The fee of the streets is in the corporation and the dominion over them is as absolute as that of the owner of other lands." *C. & V. R. R. Co. v. People*, 92 Ill. 170; *City of Quincy v. Bull*, 106 Ill. 337; 2 Dillon

on Municipal Corporations, 2d Ed., 551. Sustaining our position on the question of damages, see *Rigney v. City of Chicago*, 102 Ill. 64; *Shawneetown v. Mason*, 82 Ill. 337; *Lewis on Eminent Domain*, 236. There is no averment in the declaration that the water tower is not such a structure that might be put in the streets. In some States it has been held that such structures may be placed in the streets. *West v. Bancroft*, 32 Vt. 367.

We think the declaration fails to show a cause of action. The judgment of the court below is affirmed.

Joseph Spear v. George A. Detrick.

1. *Verdict—Question of Fact—Weight of Testimony.*—Where the verdict of the jury is not manifestly against the weight of the testimony it will not be disturbed.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Whiteside County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of the facts is contained in the opinion of the court.

C. L. SHELDON, attorney for appellant.

H. C. WARD, attorney for appellee.

OPINION OF THE COURT, LACEY, J.

This was a suit brought in the Circuit Court by appellee against appellant on account for pressing hay, and the use of his barn; the error assigned is that the verdict is manifestly against the weight of the evidence. The parties stipulated on the trial that the amount of hay pressed by the appellee for the appellant and shipped to Peoria, was 105 tons and 310 pounds. The appellant's evidence shows that the hay pressed by the appellee was mixed with hay from the same barn pressed by one Helmick, and about four tons of the hay

Spear v. Detrick.

shipped to Peoria was of the Helmick hay, and not baled by the appellee, and the appellee not entitled to pay for baling that amount; it was not positive, however, that this was the accurate amount of the Helmick hay. In the progress of the trial the appellant tendered to appellee what he claimed was the balance due him and the costs up to that time, to wit: sheriff's fees \$2.35; clerk's fees \$1.50; pressing hay \$21; use of barn \$5. The appellee, by his replication filed, received this amount as payment on the amount due him, and averred that the sum named in the declaration was still due him, less the amount of the tender which he received and took out of court, which he accepted as part payment. The verdict of the jury was \$57 for the appellee, who remitted \$15 of the amount, and the court gave judgment for him for \$42, and credited \$3.85 on the costs, amount tendered on them. The price for pressing the hay was to be \$1.75 per ton. Appellant had paid \$125 on the account and in addition, the \$26 received by appellee of the tender, his entire credit would amount to \$151.

The evidence tended to show a small quantity of appellant's hay not baled by appellee, shipped to Peoria, and making up the 105 tons and 310 pounds shipped to Peoria. The appellant violated his agreement to keep correct account, and mixed the hay, and put it out of his power to show how much was not baled by appellee, and the jury were justified in rejecting his claim. Allowing the plaintiff for the pay of 101 tons of hay, his charge would be \$176.75 for pressing the hay, and allowing him \$25 for the use of the hay barn for five years, his account would be \$191.75; from this amount deduct \$151, leaves \$40.75 due appellee, within \$1.25 of the amount of the judgment. There can not be much controversy about the hay account. The main controversy, therefore, is whether the appellee was entitled to over five dollars for the use of the barn. The evidence was quite conflicting as to the value of the use of the barn, ranging from \$12 a year to one dollar, and appellant had had the use of it for five years. The first account rendered by appellee to the appellant for the use of the barn was five

dollars, but he claims that to be a mistake in writing it down; that he intended to charge five dollars a year; and by the remittitur the allowance for the use of the barn was intended to be reduced to the amount of the \$25, being \$20 more than the appellant was willing to pay for it. It is claimed by the appellant that he had the use of the barn as a mere accommodation, and that no charge was intended to be made. The evidence rather impresses us that that was probably so, but on the contrary, there was evidence submitted to the jury sustaining the appellee's theory that he was to have for the use of the barn what it was really worth, and there is evidence tending to show that it was worth for the five years at least \$25. The verdict of the jury is not so manifestly against the weight of the evidence that we feel at liberty to disturb it on that account, though we would have been better satisfied if the judgment had been about \$20 less. Seeing no error sufficient to reverse, the judgment of the court below is affirmed.

Judge CARTWRIGHT, having tried the case in the court below, took no part in rendering this decision.

Barnard v. Reynolds.

1. *Surety—Release by Extension of Time.*—M. borrowed from B. \$600. for which he gave a note payable in one year with interest at the rate of eight per cent per annum, payable semi-annually, with R. as security. When the note became due, B. extended the time of payment for six months, M. agreeing to retain the money and pay interest at the rate provided in the note. Like extensions were subsequently made every six months, with the consent of R., until November, 1886, after which extensions were made without his knowledge. The last extension was made May 23, 1888. Suit was brought on the note one year afterward, and R. pleaded specially the extension of payment without his consent and consequent release from liability. *It was held*, that such extension did not have the effect of releasing R. from his liability as security on the note.

2. *Error—One Person Suing out a Writ Can Not Assign Error for the Other.*—One of two defendants sued out a writ of error; the other did not. In the Appellate Court *it was held* that the one suing out the writ could not assign error in the judgment affecting only the one who did not.

Barnard v. Reynolds.

Memorandum.—Assumpsit. Writ of error to the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the December term, 1892, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

J. A. McKENZIE and C. S. HARRIS, attorneys for plaintiff in error.

GEO. W. THOMPSON and E. P. WILLIAMS, attorneys for defendant in error.

OPINION OF THE COURT, HARKER, P. J.

It appears from the record in this case that on the 15th of November, 1884, A. H. Marsh borrowed from L. E. Barnard \$600, for which he gave a note payable in one year with interest at the rate of eight per cent per annum, payable semi-annually, with W. H. Reynolds as surety. When the note became due Barnard extended the time of payment for six months, Marsh agreeing to retain the money and pay interest at the rate specified in the note. Like extensions were subsequently made every six months with the consent of Reynolds until November, 1886, after which extensions were made without his knowledge. The last extension was made on the 23d of May, 1888, which, we think, although there was some conflict in the evidence, was made upon the agreement of Marsh that he would retain the money six months longer and pay the interest for that time. Suit was brought on the note one year afterward. Reynolds plead specially the extension of payment without his consent and consequent release from liability.

The case has been here before and is reported in 36 Appellate Court Reports, 219. The legal features of the controversy were there discussed, and we refer to the opinion therein filed as containing the law of the case.

After the case was remanded, on a trial in the Circuit Court the jury returned special findings and a general verdict in favor of Reynolds, and a verdict against Marsh fix-

ing the damages at \$782. The Circuit Court overruled a motion for a new trial and entered judgment for costs in favor of Reynolds and against Marsh for \$728.

We must hold against the plaintiff in error on the two points made by him which relate to Reynolds: (1) that the verdict is against the evidence; (2) that the extension as claimed did not release the surety. The evidence in the record satisfies us that there was an agreement made in May, 1888, that Barnard should extend payment six months and that in consideration thereof Marsh would retain the money for that time and pay interest at the rate specified in the note.

There is no pretense that Reynolds consented to or knew anything of that agreement. That such extension would have the effect to release Reynolds was held by us in *Reynolds v. Barnard*, 36 Ill. App. 219, and by our Supreme Court in *Crossman v. Wohlleben*, 90 Ill. 537, and in *Dodgson v. Henderson*, 113 Ill. 361.

It is also assigned for error that the Circuit Court rendered judgment against Marsh for only \$728 when the verdict was for \$782. Reynolds is in no wise concerned with that part of the judgment. No service of the writ of error has ever been had upon Marsh nor has he entered his appearance without jurisdiction of his person; we shall not undertake to correct the judgment or make any order affecting his right.

The judgment so far as it appertains to Reynolds will be affirmed.

The Hercules Iron Works v. Hummer, Assignee, etc.

1. *Payment—Promissory Note—When.*—It has been held in several of the States that the giving of a negotiable note in consideration of a simple contract debt, discharges the contract on which the debt is founded, but the decided weight of authority in this country and England is to the contrary. To have that effect, it must be agreed that the

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49	598
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note shall be taken in absolute payment, or that the creditor has so parted with the note as to subject the debtor to double payment.

2. *Payment by Note—Inference of Discharge.*—Where it is claimed by a debtor that a promissory note has been given in discharge of the obligation of a contract, the burden of proof is upon him to show that the note was both given and received as an absolute payment, except in cases where the evidence raises a positive inference of discharge.

3. *Assignment for the Benefit of Creditors—Property Subject to Liens, etc.*—A brewing company entered into a contract with the Hercules Iron Works, to put into its establishment a refrigerating plant, for \$10,500, to be paid for as follows: one-fourth cash on delivery of the machinery; one-fourth on the complete erection of the plant; \$2,750, by a note payable in four months, the balance in first mortgage bonds due in ten years. The iron works put in the plant, received the first cash payment. The second was not made in cash, but instead thereof a note due in ninety days was taken. Afterward a note for the third payment was taken. Neither of these notes was paid. The contract contained a clause that the iron works should have a right to remove the plant in case of default in any of the payments. Afterward the brewing company made an assignment for the benefit of its creditors; the iron works filed a petition in the County Court, claiming the right to remove the plant, according to the terms of the contract; the court dismissed the petition and the iron works appealed. *It was held*, that as between the parties to it, the contract was valid, there being no judgment or attaching creditors, or *bona fide* purchasers without notice, and that the assignee occupied no different position from the brewing company, the assignor.

4. *Assignments for the Benefit of Creditors—What the Assignee Takes.*—Under a general assignment, the assignee takes as a mere volunteer, and the property assigned is subject to the same defects of title, equities and liens as when in the hands of the assignor.

Memorandum.—Assignment for the benefit of creditors. Petition by creditors to remove property, etc. Appeal from the County Court of La Salle County; the Hon. BENJAMIN F. LINCOLN, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, BREWER & STRAWN, ATTORNEYS.

Parsons says that in Massachusetts, Maine and Vermont, a negotiable note, given in consideration of a simple contract debt, due, is a discharge of the simple contract, but that the rule is otherwise in all other parts of the country and in England and in the United States courts. 2 Parsons on

Notes and Bills, 150. That the Massachusetts rule is the exception is also noted in *Tyner v. Stoops*, 11 Ind. 22, 71 Am. Dec. 341, 346.

The decided weight of authority is that, taking a note either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note in absolute payment, or unless the creditor has parted with the note so as to subject the debtor to double payment. *Johnson v. Weed*, 9 Johns. 310, 6 Am. Dec. 279; *Murray v. Gouverneur*, 2 Johns. Cas. 438, 1 Am. Dec. 177; *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452; *Perry v. Griffin*, 10 Md. 27, 69 Am. Dec. 123; *Tyner v. Stoops*, 11 Ind. 22, 71 Am. Dec. 341; *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Hunter v. Moul*, 98 Pa. St. 13, 42 Am. Rep. 610; *Nightingale, Assignee, v. Chafee*, 11 R. I. 609, 23 Am. Rep. 531; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15; *Merrick v. Boury*, 4 O. St. 60; *Combination Steel & I. Co. v. St. Paul City Ry. Co.*, 47 Minn. 207; *Fry v. Patterson*, 49 N. J. Law, 612; *Bank of Monroe v. Gifford*, 79 Iowa, 300, 308; *Albright v. Griffin*, 78 Ind. 182; *Bill v. Porter*, 9 Conn. 23; *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Auburn City Nat'l Bank v. Hunsiker*, 72 N. Y. 252, 257; *Graham v. Negus*, 55 Hun (N. Y.), 440; *Sheehy v. Mandeville*, 6 Cranch (U. S.), 253; *Downey v. Hicks*, 14 How. 240, 249; *The Kimball*, 3 Wall. 37; *Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623; *Stone & Gravel Co. v. Gates Iron Works*, 23 Ill. App. 635; *Chicago Times Co. v. Benedict*, 37 Ill. App. 250.

The burden of proof is on the debtor to show that the note was *both given and received* as absolute payment. *Johnson v. Weed*, 9 Johns. 310; *Mitchell v. Hockett*, 25 Cal. 538; *Nightingale, Assignee, v. Chafee*, 11 R. I. 609; *Merrick v. Boury*, 4 O. St. 60; *Haines v. Eppley*, 41 Md. 221; *Glenn v. Smith*, 2 Gill & J. 493; *Baker v. Baker*, 49 N. W. Rep. 1064; *McMurray v. Taylor*, 30 Mo. 263; 3 *Randolph on Com'l Paper*, Secs. 1513, 1517.

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The doctrine is so far modified, however, that where the evidence raises a positive inference of discharge, proof of an express agreement is unnecessary. *Wilhelm v. Schmidt*, 84 Ill. 183; *Chisholm v. Williams*, 128 Ill. 115.

This contract was a conditional sale with the right on the part of the vendor to enter and retake its property in case the purchaser made default in any of the payments. That such a contract is legal and valid between the parties is universally held in America. 1 *Benjamin on Sales* (6th Am. Ed.), 397; *Fosdick v. Schall*, 99 U. S. 235, 250; *Brundage v. Camp*, 21 Ill. 330; *Murch v. Wright*, 46 Ill. 487; *Lucas v. Campbell*, 88 Ill. 447; *Latham v. Sumner*, 89 Ill. 233; *Fairbanks v. Malloy*, 16 Brad. 277.

It is equally well settled that an assignee under a general assignment takes as a mere volunteer, and the property assigned is subject to the same liens, defects of title and equities, as when in the hands of the assignor. *Jordan v. Easter*, 2 Brad. 73, 79; *O'Hara v. Jones*, 46 Ill. 288; *Davis, Cory & Co. v. Chicago Dock Co.*, 129 Ill. 180.

APPELLEE'S BRIEF, SNYDER, STEAD & ELDREDGE, THOS. N.
HASKINS, F. J. SHEEHY AND CHAMBERS & JACKSON,
ATTORNEYS.

The acceptance of past due installments, when payment is to be made in that manner, will amount to a waiver of a forfeiture that may have previously occurred. *Am. & Eng. Encyclopedia of Law*, Vol. 3, p. 435; *Deyoe v. Jamison*, 33 Mich. 94; *Hutchings v. Munger*, 41 N. Y. 155; *Cushman v. Jewel*, 7 Hun, 525; *Taylor v. Finley*, 48 Vt. 78; *Blair v. Hamilton*, 48 Ind. 32; *Underwood v. Wolf*, 131 Ill. 441; *Telegraph Co. v. Bush*, 35 Ill. App. 214; *Scutt v. Robertson*, 127 Ill. 137; *Greenwood v. Feen*, 136 Ill. 158; *Perry v. Pearson*, 135 Ill. 239.

OPINION OF THE COURT, HARKER, P. J.

On the 12th of January, 1892, the La Salle Brewing Company made a contract with appellant to put into its establishment a twenty-five ton refrigerating plant, for \$10,500, to

be paid for as follows: \$2,625 in cash, on the delivery of the machinery; \$2,625 in cash, on complete erection of all machinery as specified; \$2,750 by note, dated April 1, 1892, payable four months from date, with six per cent interest; \$2,500 in first mortgage bonds, bearing six per cent interest, and due in ten years, to be delivered at the time of the second payment. The plant was put in and appellant received the cash payment first mentioned. The second payment was not made in cash, but instead thereof a note, due in ninety days, was executed and delivered. On the 19th of April, 1892, the note for the third payment was received, and some time during the latter part of June, the \$2,500 in six per cent bonds were received. Neither of the notes were paid.

On the 9th of November, 1892, the La Salle Brewing Company made an assignment for the benefit of its creditors to W. B. Hummer. Hummer filed a petition in the County Court for an order to sell the property, and asked that appellant's other bondholder and one F. J. Sheehy, claiming to have a mechanics' lien, be cited to appear and make proof of their claims. No citation issued, but all except appellant appeared, and the court found that Sheehy and Chambers & Jackson were each entitled to mechanics' liens.

On the 3d of January, 1893, appellant filed a petition in the County Court setting up its contract, the subsequent transactions in regard to the refrigerating plant, and claiming the right to remove the plant, according to the terms of the contract in case of default in any of the payments. By agreement, all parties interested appearing, a hearing was had upon the same day and the case taken under advisement. On the next day, against appellant's objection, the case was re-opened and additional evidence heard.

The court ordered the property sold and dismissed appellant's petition. The property was sold on February 23, 1893, for \$42,000, subject to all taxes and liens. The sale was approved and the assignee ordered to execute deed to the purchaser.

Appellant contends that, the La Salle Brewing Company

Hercules Iron Works v. Hummer.

having made default in the payments, appellant had the right to remove the refrigerating plant as against the brewing company, and that such right exists as against the assignee and other defendants to its petition. Not only was default made in the second and third payments, according to the terms of the contract, but those payments have never been made. The second payment was not made in cash but a note, which has never been paid, was given instead.

Although it has been held in several of the States that the giving of a negotiable note, in consideration of a simple contract debt, discharges the contract on which the debt was founded, the decided weight of authority in this country and England is to the contrary. To have that effect, it must appear that it was agreed that the note should be taken in absolute payment, or that the creditor has so parted with the note as to subject the debtor to double payment. Our Supreme Court has followed the current of authority. *Wilhelm v. Schmidt*, 84 Ill. 183; *Walsh v. Lennon*, 98 Ill. 27; *Stone and Gravel Co. v. Gates Iron Works*, 124 Ill. 623. Except in a case where the evidence raises a positive inference of discharge, the burden of proof is in the debtor to show that the note was both given and received as an absolute payment. We think a court should, with great caution, reach the conclusion that the evidence raises an inference of discharge in a case where the creditor would thereby lose some security which he held before taking the note. In this case appellant reserved, by its contract, title to the property, with the right to take possession and remove the same, until all payments were fully made. It can hardly be presumed that appellant, when it took the ninety days note, at a time when the brewing company was hard pressed for money, intended to release the security provided for by the contract.

As between the parties the contract was legal and valid. Had no assignment been made, and had the brewing company remained in possession of the property, there could be no question of the right of appellant at the date of filing its petition to enter and retake the property. The assignee,

in relation to the rights of appellant, occupies no different position from the brewing company. Under a general assignment the assignee takes as a mere volunteer, and the property assigned is subject to the same defects of title, equities and liens, as when in the hands of the assignor. *O'Hara v. Jones*, 46 Ill. 288; *Davis, Cory & Co. v. Chicago Dock Co.*, 129 Ill. 180.

Of course, when such a contract is made, it is with the risk on the part of the vendor of losing his right to take the property by its being levied upon by creditors of the purchaser while in his possession, or by its being sold to a purchaser without notice. In this case, however, at the time of filing the petition, there were no judgment or attaching creditors, the refrigerating plant or the premises on which it was situated had not been levied upon, and there was no *bona fide* purchaser without notice. There was no evidence of any creditor having a lien against whom the contract would not be valid.

The premises were bonded before the refrigerating plant was put in or the contract made. At the time the bonds were issued, the plant was no part of the security taken. The fact that it was to become a part of the realty when permanently affixed to it, is subordinate to the intention expressed by the contract. There was no proof that any of the bonds went out of the hands of the company or the trustee after the plant was put in, excepting such as were received by appellant under the contract.

While it is true that the record contains an order giving liens to Sheehy and Chambers & Jackson, it appears that when the court so determined, appellant had not been served and had not appeared. It was not bound by that order.

We are of the opinion that the order of the County Court, dismissing appellant's petition, should be reversed and the cause remanded, with directions to allow issues to be made on the petitions and evidence heard, and to render an order consistent with this opinion.

Colley v. Harding.

Colley v. Harding.

1. *Jury—Province to Reconcile Conflicting Evidence.*—It is the province of the jury to reconcile conflicting evidence, and settle doubtful questions of fact. The Appellate Court will not disturb a finding, unless the verdict is so clearly against the evidence as to be considered the result of passion, prejudice or a palpable misapprehension of the facts.

Memorandum.—Trespass for cutting ice. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE CASE.

This action was brought by appellant, Colley, against the appellee, Harding, to recover damages for an alleged trespass upon lots in the city of Streator, by cutting and carrying away ice from that portion of the Vermillion river flowing over said lots. On the trial, the appellee contended that the ice was cut and removed from that portion of the river east of the east line of appellant's lots, and therefore not from his lands. The judgment being for the defendant, the plaintiff appeals.

H. N. RYON & SON and A. P. WRIGHT, attorneys for appellant.

MCDUGALL & CHAPMAN and J. T. MURDOCK, attorneys for appellee.

OPINION OF THE COURT, HARKER, P. J.

This action was brought by appellant to recover damages for the alleged trespass of cutting and removing ice from that part of the Vermillion river which overflowed his outlots 1, 2 and 3, in Riverside addition to the city of Streator. He was defeated in a trial in the Circuit Court, and judgment rendered against him for costs. He urges a reversal upon the sole ground that the verdict was against the evidence.

Appellee was engaged in harvesting ice for storage. Whether in his operations he cut and removed ice from the lots described, was the question tried and decided by the jury. There was some conflict between the witnesses and uncertainty as to location. An examination of the evidence in the record, leaves our minds in doubt. It is the province of the jury to reconcile conflicting evidence and settle doubtful questions of fact. If the trial was fairly had, and no error of the trial court intervened, an appellate court should not disturb the finding, unless the verdict is so clearly against the evidence as to be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts. *C. & A. R. R. Co. v. Shannon, Adm'r, etc.*, 43 Ill. 338; *Twining v. Martin*, 65 Ill. 157.

We do not feel warranted in disturbing the finding which the jury made in this case. Judgment affirmed.

Jacob Becker v. Bertha Schiller.

1. *Slander—Allegations and Proof—Conversations.*—In a declaration for slander, where the actionable words were alleged to have been spoken in the third person, the evidence showed them to have been spoken in the second person. *It was held*, that the allegations were not sustained by the proof.

2. *Jury—Disregarding Instructions.*—Where a jury disregards the instructions of the court, their verdict may be set aside and a new trial granted.

Memorandum.—Action for slander. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

ALEXIS L. GRANGER, attorney for appellant.

RICHARDSON BROS., attorneys for appellee.

Becker v. Schiller.

OPINION OF THE COURT, CARTWRIGHT, J.

This is a suit by appellee against appellant, for slander. The declaration charged that appellant, in a conversation in the German language, used, concerning appellee, the following slanderous words: "Mrs. Schiller is eine hure." She lives with a hure-master." It was also alleged that these words, when interpreted into the English language, were as follows: "Mrs. Schiller is a whore. She lives with a whoremaster." There was a trial, resulting in a verdict for appellee, for \$500, on which judgment was entered.

The parties were German, well advanced in years, and were neighbors. It appeared that they quarreled, and that what was said by the defendant was addressed directly to the plaintiff. The witnesses for the plaintiff all testified through an interpreter, and much difficulty was experienced in getting before the jury any evidence of what words were used by the defendant. The words charged in the declaration to have been spoken, were not proved by any of them, nor were enough of such words to amount to a charge of adultery. The declaration was, therefore, not sustained by the proof. *Wilborn v. Odell*, 29 Ill. 456; *Wallace v. Dixon*, 82 Ill. 202.

The words sworn to, being addressed to plaintiff, were in the second person, instead of the third, as alleged, and the nearest approach to the words alleged was obtained by a leading question, and was the following: "Du bist eine hure;" which was interpreted, "You are a whore." The court instructed the jury that the allegation of words spoken in the third person, was not sustained by proof of words spoken in the second person, and the instruction was in accordance with the settled law on that subject. 1 Chitty Pl. 405; *Sanford v. Gaddis*, 15 Ill. 229.

But the jury disregarded the instruction, and returned a verdict for plaintiff, which should have been set aside. The judgment will be reversed and the cause remanded.

Alday v. Kenworthy.

1. *Practice—Affidavits—Bill of Exception.*—If a party desires to have affidavits read on the hearing of a motion made a part of the record, he must preserve them in a bill of exceptions.

Memorandum.—Appeal from the County Court of Rock Island County; the Hon. LUCIAN ADAMS, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

CARL KUEHL, attorney for appellant.

J. T. KENWORTHY, *pro se*.

OPINION OF THE COURT, CARTWRIGHT, J.

This case is brought here to review the action of the County Court in overruling a motion made by appellant to set aside the verdict and grant a new trial, and in entering judgment on the verdict.

The record shows that appellee brought the suit, that appellant appeared and filed a plea of the general issue, that the cause was set for trial on Friday afternoon, November 25, 1892, at 2 o'clock, by order of the court in pursuance of the agreement of the parties, and that on that day appellant not appearing, a jury was impaneled and a verdict returned for appellee for \$251.32.

Afterward, on November 29, 1892, a motion was entered by appellant to set aside said verdict and for a new trial.

The motion was overruled and judgment entered.

The bill of exceptions merely recites the making and overruling of the motion, and contains no affidavit or other proof in its support. The clerk of the court has copied into the transcript of the record affidavits of appellant and his attorney, stating that the proceedings on November 25th were in violation of an agreement made by appellee; that appellant's attorney was sick and unable to attend on that

Iowa Central R. R. Co. v. Gushee.

date, and that appellant could not reach the court house on account of the electric cars being stopped by bad weather; and also an affidavit of John H. Mueller, that he telephoned the fact of the attorney's illness to the clerk of the court. These affidavits were improperly copied into the transcript. *Roberts v. Fahs*, 36 Ill. 268. If appellant intended to have the affidavits made a part of the record, he should have preserved them in the bill of exceptions. That is the only method by which it could be done. *Phillips v. People*, 88 Ill. 160; *C. & St. L. R. R. Co. v. Easterly*, 89 Ill. 156; *Earll v. People*, 73 Ill. 329.

The affidavits copied into the transcript can have no influence in determining the case, and no reason appearing in the record why the action of the court was not right, the judgment will be affirmed.

Iowa Central Railroad Co. v. Gushee.

1. *Railroad Companies—Obligation to Fence.*—A station, not in an incorporated city or village, was located in a public highway. There was a platform, and near by were yards, cribs and a grain dump; there was no incorporated town with lots or blocks, and nothing else at the station except a store where tickets were sold. For many years it had been a flag station, and the business was so small that the public accommodation and convenience, presumably, did not require any building or shelter, as none was erected. *It was held* that no conditions existed that would exempt the railroad from the statutory requirement to fence its road.

2. *Railroad Company—Obligation to Fence.*—Where there was a highway on both sides of a railroad track, and the track is laid in one of them, *it was held*, that such a place is not excepted from the provisions of the statute requiring the railroad company to fence its track, and in this instance there is no exemption on account of public interests, because the usefulness of the highways would not be impaired by such fencing, and the public accommodation and convenience in their use did not require that the railroad track should not be fenced.

Memorandum.—Action for killing domestic animals. Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE CASE.

This was a suit begun by appellee against appellant to recover for killing two head of cattle at the station of Ogle, on the line of its road. The right is based on the claim that the cattle got upon the railroad and were killed at a place where the company was bound, under the statute, to fence its road. No attempt was made to show anything else which the law regards as negligence, or violation of duty on the part of appellant or any of its servants.

There was a judgment for the plaintiff, and the defendant appeals.

GRIER & STEWART, attorneys for appellant.

APPELLEE'S BRIEF, PEPPER & SCOTT, ATTORNEYS.

Under a statute exempting a railroad from fencing within the limits of a village, it was held that where an animal gets upon the track where it is unfenced, and at a place which is apparently beyond the limits of the village, and in consequence of so doing, is killed, the company is *prima facie* liable, and the burden is upon it to show that the place in question is within the limits of the village. *Ewing v. Chicago & A. R. R. Co.*, 72 Ill. 25.

Whether the public convenience could not be as well subserved with the track fenced, as with it unfenced, is a question of fact. *Chicago & E. I. R. Co. v. Guertin*, 115 Ill. 466; *Chicago & E. I. R. Co. v. Modesitt (Ind.)*, 24 N. E. Rep. 986.

A railroad company must fence its track, which is legally occupying a portion of a country road. *Illinois C. R. R. Co. v. Trowbridge*, 31 Ill. App. 190.

The general rule, without reference to statutory enactments, is stated to be that, although the place in question be in law a public place, still if, for any reason, it be not used, and is not likely to be used as such by the public, the road must be fenced. *Thompson on Negligence*, 521.

Iowa Central R. R. Co. v. Gushee.

OPINION OF THE COURT, CARTWRIGHT, J.

This suit was begun by appellee, before a justice of the peace, to recover damages for the killing of a cow and heifer, at the station of Ogle, by a train of appellant. There was a recovery before the justice, and on appeal to the Circuit Court appellee again recovered the value of the cattle, and also attorney's fees.

The railroad, at the station in question, was laid in a public highway. Afterward there was a proceeding had for the purpose of changing the highway and laying it south of the railroad, and vacating that part north of the railroad. The commissioners of highways granted the prayer of the petition by indorsement upon it, and by their final order laid a highway fifty feet wide south of the railroad; but it is claimed by appellant that they did not vacate the old highway in which the railroad was laid. The old highway was left open, and extended about thirty feet north of the railroad, leaving an open strip of that width. This strip of land and the highway south of the railroad were eighty rods long, and the railroad was unfenced for that distance. About the center of that space there was a railroad platform, and near by were yards, cribs and a grain dump. There was no incorporated town with lots or blocks, and there was nothing else at the station except a store north of the old highway, where tickets were sold. The cattle were first seen upon the track near the east end of the open space, nearly forty rods east of the platform. The place where they came upon the track was unfenced, and no conditions existed that would exempt appellant from the statutory requirement to fence its road. The station was a very small affair. For many years it had been a flag station, and the business was so small that the public accommodation and convenience presumably did not require any building or shelter, as none was erected. It seems clear that the public would not require a distance of forty rods each way from the platform to be unfenced to afford convenient access to the station for the transaction of business done there, and therefore appellant was not relieved from the duty of fenc-

ing where the cattle came on the track on account of the station being where it was. *C., B. & Q. R. R. Co. v. Hans*, 111 Ill. 114. So, also, with respect to the obligation to fence, it was wholly immaterial whether the old highway was vacated or not. If it be conceded that there was a highway on each side of the railroad, and that the track was in one of them, such a place was not excepted by the terms of the statute; and, applying the same reasonable rule laid down in the above case, there was no exemption on account of public interests, because the usefulness of the highways would not be impaired by such fencing, and the public accommodation and convenience in their use did not require that the railroad should not be fenced.

The cattle were seen by the fireman when the train was as much as five hundred feet from them. The train was a freight which had come down a steep grade, but had reached its foot, and was going up grade. The engineer was working steam, and made no effort to slacken speed, although the cattle were visible on the track, but continued at a rapid rate, much faster than the schedule time, not stopping at the station, and overtook the cattle near the platform, where they were killed.

In our opinion the evidence justified the verdict, and the judgment will be affirmed.

There was a motion by appellee to tax to appellant the cost of an additional abstract, and the motion was taken with the case. We regard the additional abstract as unnecessary, and the motion will be denied.

McBride v. McClure.

1. *Contracts—Silence Warrants the Conclusion of an Acceptance.*—A heating furnace was put into a dwelling house, with the understanding that if it did not work satisfactorily, to notify the person putting it in and he would correct it. The owner of the house used the furnace through the cold weather of January and February, without com-

McBride v. McClure.

plaint, until the seventh day of March, when he was requested to pay for it. *It was held* that the circumstances warranted the conclusion that the furnace was accepted.

Memorandum.—Assumpsit for goods sold. Judgment for plaintiff. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

BROWNE & AYERS, attorneys for appellant.

SNYDER, STEAD & ELDREDGE, attorneys for appellee.

OPINION OF THE COURT, HARKER, P. J.

This was a suit to recover the price of a house heating furnace, placed in the dwelling of appellant by appellee. The defense interposed was that the furnace did not perform its work satisfactorily and did not furnish sufficient heat to warm appellant's house, as it was agreed by appellee that it should. There was a recovery for \$170. Appellant appealed from the judgment, and now asks a reversal because the court refused proper evidence offered by him, gave erroneous instructions for the plaintiff, refused proper instructions asked by the defendant, and because the verdict is against the evidence.

The evidence was confined almost entirely to the testimony of the parties. As to the terms of the contract and the amount of heat it was agreed the furnace should supply, there was a direct conflict between them. Appellant testified that the furnace was warranted to heat his whole house, except the kitchen and an attic. Appellee testified that the furnace was not warranted to heat the whole house, but that it was the agreement that in cold weather appellant was to shut off the front parlor, hall and two bedrooms. The evidence clearly shows that the furnace had not the power to heat the entire house in extremely cold weather. The jury adopted the contention of appellee, and we are not prepared

to say they were wrong. With the parties before them, their opportunities for judging of their credibility as witnesses were superior to ours.

The furnace was set up and completed on the 9th of January, 1892. The pipes had been previously put in by a tinner. Appellee then told appellant, that if anything occurred in the working of the furnace that was not satisfactory, or which appellant did not understand, to let him know and he would correct it. Appellant used the furnace through the cold weather of January and February, and made no complaint to appellee as to the amount of heat furnished, or the working of the apparatus until the 7th day of March, and then after being requested to remit the contract price, he testified that it worked during those two months the same as it had ever since. Such circumstances, we think, warranted the conclusion of an acceptance.

We see no serious error of the court in sustaining objections to questions asked appellant. Some of them were improper for form. Others required answers amounting to an opinion as to what was the contract, and as to whether he had accepted the furnace. When all the conversations and correspondence between the parties negotiating, were put in evidence, it was for the jury to say what the contract was. When all the facts and circumstances occurring after the furnace was set up were put in evidence, it was for the jury to say whether there was an acceptance. The ruling of the court did not preclude the introduction of any fact material to the issue.

The instructions given for the plaintiff are not open to the criticism that they predicate an acceptance. They state the law correctly and there was evidence to warrant the giving of them.

We think the third instruction offered by the defendant, and refused, stated the law correctly and was applicable to the case; but inasmuch as the principles contained in it were substantially set forth in other instructions which were given, we do not feel that serious harm was occasioned appellant by its refusal. The fifth instruction offered by the

McAmore v. Wiley.

defendant and refused, was had because it did not tell the jury that notice from McBride that the furnace did not do the work and was not satisfactory, should be given within a reasonable time. In view of this instruction, the continued use of the furnace for any length of time, without complaint or objection, would not amount to an acceptance.

The judgment should be affirmed.

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McAmore v. Wiley.

1. *Evidence—Books of Account—Foundation for Admission in Evidence.*—It is error to admit books of account in evidence without making the preliminary proof of the facts required by Sec. 3, Ch. 51, Revised Statutes.

2. *Evidence—Books of Account—Footings.*—Footings in books of account form no part of the original entries and are not admissible in evidence as such.

3. *Witness—Competency—Age.*—Where it appeared from her examination that a girl of thirteen understood that pains and penalties were attached to the crime of perjury and had the moral perception of a girl of that age, it was held error to exclude her from testifying, on the ground that she did not understand the nature of an oath.

4. *Witness—Competency—Intelligence.*—The question of the witness' intelligence, goes more to his credibility, than to his competency as a witness. His knowledge or want of it may be taken into consideration by the jury in determining the weight to be given to his testimony.

5. *Witness—Religious Tests.*—No religious tests are now required to qualify a person to be a witness, under the constitution of the State of Illinois.

6. *Instructions—Burden of Proof.*—An instruction which makes the proof on the part of the defendant supply the preponderance of the evidence, which the law requires of the plaintiff, and gives him a verdict without proof, is erroneous, as it improperly shifts the burden upon the defendant.

Memorandum.—Assumpsit. Action for goods sold and delivered. Appeal from a judgment rendered by the Circuit Court of Jo Daviess County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, A. D. 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, E. L. BEDFORD, ATTORNEY.

It was error to permit appellee to testify to the result of their examination of the account book in question. 1 Thompson on Trials, Sec. 377.

Lumping charges renders the entry inadmissible. A charge by a mechanic for one hundred and ninety days work was ruled out as not sufficiently specific. Lynch v. Petrie, 1 Nott & McC. (S. C.) 130.

So a charge by a physician of \$13, for attendance and medicine for curing the whooping cough, was rejected. Hughes v. Hampton, 2 Treadw. (S. C.) 745; 2 Rice Ev. 830.

No religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation, because of his religious belief. In Hronek v. The People, 134 Ill. 139, it was decided that by virtue of Sec. 3, Art. 2, Constitution of Illinois, 1870, a person who did not believe "that God would punish him in this world or the next," should be permitted to testify.

APPELLEE'S BRIEF, D. & T. J. AND J. M. SHEEAN, ATTORNEYS.

Whether a child shall be permitted to testify, is wholly a question of intelligence and of a due sense of the obligation of an oath, and the judge is allowed a large discretion. 10 Am. and Eng. Enc. of Law, 619.

The testimony of the plaintiff's wife, to the effect that her husband was absent most of the time, and that in his absence she managed the hotel for him, is sufficient proof of her agency to render her a competent witness. Mitchell v. Hughes, 24 Ill. App. 308. See also Mabley v. Irwin et al., 16 Brad. 362; Poppers v. Miller, 14 Brad. 87; Robertson v. Brost, 83 Ill. 116.

OPINION OF THE COURT, LACEY, J.

This suit was commenced by appellee, a store keeper, originally before a justice of the peace, to recover the amount of a bill of goods sold to the appellant, to the amount of \$62. the evidence of which rested in book account. The case was tried before a justice of the peace, and afterward appealed to the Circuit Court. Before the commencement

McAmore v. Wiley.

of the suit the appellee's store building and book of accounts were destroyed by fire: The trial resulted in a verdict and judgment against appellant for \$53.60.

There are several causes assigned for error by appellant: First. The improper admission of evidence by the court in appellee's favor. Second. The improper exclusion of the evidence of Lillie McAmore, a competent witness offered by appellant. Third. That the court gave improper instructions on the part of appellee.

We think all these points are well taken. First. The witness, the wife of the appellee, Mrs. Sarah Wiley, was called, and allowed to testify in behalf of her husband as follows, to wit: "About two weeks before the fire I balanced his (appellant's) account. I saw his account was \$62 and some cents." This evidence was given against the objection of appellant, who at the time took an exception. The substance of this evidence was the proving the contents of appellee's books of account without laying the proper foundation, and in proving the footings which were no part of the original entries. It would be improper, also, to introduce the contents of appellee's books of account without making the preliminary proof of the facts required by statute, Sec. 3, Chap. 51, R. S.

The evidence of Lillie McAmore, who was a bright girl, of the age of thirteen years, was excluded, on the grounds that she did not understand the nature of an oath. She was examined on her *voir dire* and testified, among other things, that she knew it would not be right to tell a lie, and the court, on its own motion, instructed her as to the nature of an oath, and told her that if she swore to that which was not true and answered the attorneys and told lies, she would be punished and might be sent to jail; and that it was wrong to swear to that which was not true. In answer to the question of the court she stated that she understood it. We think this witness understood, after the instructions of the court, the substantial nature of an oath. She understood that pains and penalties were attached to the crime of perjury, and seemed to have the moral perception

expected of a girl of her age. No religious test is now required to qualify a person to be a witness, under the present constitution of this State. *Hronek v. The People*, 134 Ill. 139. The question of the girl's intelligence went more to her credibility than to her competency as a witness.

The jury might take the fact of her intelligence, or want of it, into consideration in determining the weight to be given to her evidence. Many intelligent persons would probably fail, upon examination, to give a correct definition of the nature of an oath, as defined by Webster, and yet those persons be perfectly competent witnesses. We therefore think the proposed witness should have been permitted to testify.

We now come to the question of appellee's instructions. Instruction number four, or the latter part of it, in telling the jury where the burden of proof rested, reads as follows: "And if you believe, from the evidence in this case, that the defendant claims to have paid the plaintiff for the goods in question in this case, or to have paid for them; and if you further believe, from the evidence, that the defendant has failed to prove such payments, by the preponderance of the greater weight of evidence, then you should find in favor of the plaintiff and assess his damages against the defendant, whatever sum the evidence warrants."

This instruction required the jury to find against appellant at all events, if he fails to prove payments. The amount, however, is limited by the instruction to "what the evidence warrants," thus casting the burden of proof upon the defendant, making his lack of proof supply the preponderance of the evidence the law requires of the plaintiff, and gives him a verdict, without proof, if the jury obeyed the instruction. This instruction was evidently erroneous.

There are numerous points raised in this case by counsel for appellant, many of them of a trivial character, not necessary to notice. We express no opinion as to the weight of the evidence. For the reasons above given, the judgment of the court below is reversed and the cause remanded.

O'Connor v. Village of Shabbona.

O'Connor v. The Village of Shabbona.

1. *Appellate Courts—Practice in Reviewing Cases.*—The Appellate Courts exercise appellate jurisdiction only, and this consists in reviewing cases as they appear in the trial court, and not in trying them *de novo*. If the parties are allowed to stipulate as to facts not appearing to the trial court, it would make the hearing in the Appellate Court a trial *de novo*, instead of a review of what was acted upon in the trial court.

2. *Appellate Courts—Practice in Hearing Cases.*—In a suit for the violation of an ordinance, brought to the Appellate Court by appeal, a stipulation was filed by the party that a certain paper offered was the “original ordinance passed by the board of trustees.” Under this stipulation the paper was presented to the Appellate Court for consideration. *It was held*, that every fact which could rightly influence the action of the trial court must be brought to its attention, if it is to have any weight in reviewing cases brought from the trial court to the Appellate Court. The stipulation was not noticed.

3. *Appellate Courts—A Rule of Practice.*—The rule that parties can not make a new case in the Appellate Court applies to the law as well as to the facts, so an objection not made in the trial court can not be considered.

Memorandum.—Suit for a violation of an ordinance. Appeal from the Circuit Court of De Kalb County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the December term, 1892, and affirmed. Opinion filed May 25, 1893. ♦

The statement of facts is contained in the opinion of the court.

O'BRIEN & O'BRIEN, attorneys for appellant.

JONES & ROGERS, attorneys for appellee.

OPINION OF THE COURT, CARTWRIGHT, P. J.

Appellant was found guilty of violating an ordinance of the village of Shabbona, prohibiting the sale of intoxicating liquor, and judgment was rendered against him for \$70, fine and costs. The only point presented to this court in his behalf is, that the record does not show proof of the passage and publication of the ordinance.

On the trial, a paper purporting to be an ordinance of the

village of Shabbona, with a certificate of the clerk of said village annexed thereto, under the corporate seal, certifying to the passage and publication thereof, and showing the date and manner of passage and publication, was offered in evidence, and was objected to generally as incompetent evidence, but no specific ground of objection was pointed out. The objection was overruled. It is now sought to be made a basis for the objection so interposed in the trial court, that the ordinance offered was the original ordinance passed by the board of trustees, and that the signature of the president to such ordinance is type-written, or printed. It is claimed that the statute only authorizes the clerk to certify to a copy of an ordinance.

A stipulation has been filed in this court by the parties, that the paper offered was the genuine, original ordinance passed by the board of trustees. This court exercises appellate jurisdiction only, and this consists in reviewing cases as they appear in the trial court, and not in trying them *de novo*. If the parties might stipulate as to facts not appearing to the trial court, it would make the hearing in this court a trial *de novo*, instead of a review of what was acted upon in the trial court. Every fact which could rightfully influence the action of the trial judge must be brought to his attention if it is to have any weight in reviewing the case here. The stipulation of the parties will therefore not be noticed.

The paper offered in evidence is sent here as a part of the record, and there is nothing about it to indicate that it is the original. It looks like a printed copy, with the memorandum of passage and approval, and the signatures of the president and clerk all printed on the ordinary kind of paper used in printing newspapers. But whether it is the original, or a copy, or whether the president wrote his name or printed it, the objection, if tenable, under any circumstances, can not be considered in this court because not made in the trial court. The rule that parties can not make a new case in this court, applies to the law as well as the facts. After a trial a party may, by reflection and research, discover and

Looney v. City of Joliet.

bring to the attention of an appellate court an objection that never occurred to him on the trial. Or he may be aware of an objection and conceal it from the court and opposite party for the purpose of an appeal in case of defeat. A trial court is not to be burdened with the duty of searching for objections which a party can not discover or may see fit to conceal. Proof of the ordinance was material and relevant, and an objection to the mode of proving it, should have been made in such a way as to enable the trial judge to understand the precise question upon which appellant required a ruling. This was not done, and it would be a manifest wrong to allow it to be done now in a review of the ruling, which must be confined to those things which were made to appear to the trial judge.

Again, the objection should have been stated so as to enable appellee to obviate it. There were several methods open to appellee for proving the ordinance, and upon an objection being made to one mode, it might have chosen to adopt another. In fact, the ordinance was subsequently proven in a different mode. The objection made in this court can not be raised here for the first time. The law, as stated above, is settled by the following cases: *Swift v. Whitney*, 20 Ill. 144; *Buntain v. Bailey*, 27 Ill. 409; *Harmon v. Thornton*, 2 Scam. 351; *Graham v. Anderson*, 42 Ill. 514; *Potter v. Potter*, 41 Ill. 80; *Howell v. Edmonds*, 47 Ill. 79; *Moser v. Kreigh*, 49 Ill. 84. The judgment will be affirmed.

Looney v. The City of Joliet.

1. *Notice—Cities and Villages—Negligence—Notice to Policeman.*—Where the police of a city are charged with the duty of entering in a record, kept at the police station, all defects found by them in sidewalks upon their beats, and are in the habit of doing so as a part of their duties to the city, *it was held*, that notice to one of their number of a defect in a sidewalk is notice to the city, and the fact that such officer is a policeman will not affect the question.

2. *Notice—Defective Sidewalks.*—Notice of the condition of a side-

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walk to an officer or agent of the city, not charged with any duty respecting it, and who is not the representative of the city concerning any matter of that kind, will not constitute actual notice to the city: but if the officer receiving the notice is charged with a duty to act concerning the defect, and to set in motion the agencies for its repair, notice to him is notice to the city.

3. *Cities and Villages—Defective Sidewalks—Notice to Policemen.*—If the policemen of a city are charged with the duty of reporting defects in sidewalks, or if they have been in the habit of doing so by the direction or with the knowledge and approval of the officers having general charge of the affairs of the city, then a notice of such a defect to one of their number would be notice to the city.

4. *Cities and Villages—Standard of Diligence in Regard to Defects in Sidewalks.*—The standard of diligence and care to be expected of a city or village in the inspection of its sidewalks, is not the same as that to be expected from a casual passer-by. Persons passing over walks with the duty of observing ordinary care for their own safety are held to have exercised such care, although not perceiving such defect, while a city or village is considered negligent in not discovering it.

Memorandum.—Action for personal injuries. Error to the Circuit Court of Will County; the Hon. GEORGE W. STIPP, Judge, presiding. Heard in this court at the May term, 1898. Opinion filed December 12, 1898.

The statement of facts is contained in the opinion of the court.

PLAINTIFF'S BRIEF, J. L. O'DONNELL, ATTORNEY.

Notice to a patrolman is notice to city, of a defect in a public sidewalk. *Twogood v. N. Y.*, 6 N. E. Rep. 275; *Rechberg v. The Mayor of N. Y.*, 34 American Repts. 657; *Fortin v. East Hampton*, 145 Mass. 196; *Donaldson v. Boston*, 82 Mass. 508; *City of Chicago v. Hoy*, 75 Ill. 530.

If a careful inspection of the sidewalk, by a person charged with the duty of inspecting the same, would have disclosed the defect, then the city will be held to have had implied notice. *Rapho v. Moore*, 68 Pa. St. 404; *City of Joliet v. Walker*, 7 Brad. 270.

Notice to a councilman is notice to the city, of a defect in a street, where a councilman is not charged especially with the duty of repairing the same. *Logansport v. Justice*, 74 Ind. 378; *Carton v. Monticello (Ia.)*, 26 N. W. Rep. 129.

If a city assumes to act in any of its departments by cer-

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tain parties, and imposes certain duties upon them, it can not raise the question of the power of such parties within the scope of such duty. *N. Y. v. Sheffield*, 4 Wall. 189.

Notice to a patrolman is notice to the city, when such policeman is charged with a duty concerning the subject of such notice. 2 *Shearman & Redfield on Negligence*, p. 77, Sec. 368.

DEFENDANT'S BRIEF, JOHN W. D'ARCY, ATTORNEY.

Before a municipal corporation can be held liable for damages resulting from a defective sidewalk, there must be actual notice to the corporation of the defect, or it must have existed a sufficient length of time to have enabled the corporation, by the exercise of reasonable diligence, to discover it, and remedy the defect. *Dillon on Municipal Corporations*, Sec. 790; *Chicago v. Murphy*, 84 Ill. 224; *Town of Grayville v. Whitaker*, 85 Ill. 441; *Chicago v. Stearns*, 105 Ill. 554; *Joliet v. Walker*, 7 Brad. 267.

The existence of the defect must not only be known, but its dangerous character must be visible and notorious, to charge the city with presumptive notice. *Chicago v. McCarthy*, 75 Ill. 602; *Dewey v. Detroit*, 15 Mich. 312; *Chicago v. Murphy*, 84 Ill. 224.

Notice to policeman is not notice to the city. *Joliet v. Seward*, 86 Ill. 402; *Dillon on Municipal Corporations*, Sec. 773.

OPINION OF THE COURT, CARTWRIGHT, J.

Plaintiff in error sued defendant in error, for damages sustained by the giving way of a broken stone in a sidewalk on which he was walking over a cellar excavated in the street in front of and in connection with a building, whereby he fell into the excavation and was injured. He was defeated on a trial of the case, and judgment was rendered against him for costs, which judgment he seeks to reverse.

It appears from the evidence that the walk was ten or twelve feet wide, and was one of the most public thoroughfares in the city. It was composed of stone flagging laid

across the walk, and had been placed there many years ago. The stone in question rested on an outer wall next the roadway and a center wall, and extended toward the building without any support beyond the center wall, to within about two feet of the building, where it was met by an iron grating extending to the building. At the time of the accident, which occurred in the evening, and without fault of the plaintiff, the stone was cracked diagonally, the crack following an old seam in the stone, and was insecure. The only question of fact in the case was whether the defendant had notice of the condition of the stone, either actual or from its existence for such a length of time that the defendant, by the exercise of reasonable care, would have known of it. The evidence upon the controverted question was that defendant had a superintendent of streets who was not aware of the defect in the stone, but a policeman had noticed it two or three days before the accident, and found that it was cracked and yielded under his feet. The superintendent of streets was accustomed to examine walks mainly by driving about the city and looking at them in passing, and he also obtained reports by means of a record kept at the police station, in which policemen were required to enter defects in sidewalks found by them on their beats. This method of ascertaining defects had been adopted by the superintendent of streets, and had been in use for some time. It was a part of the duties of the patrolmen, enjoined upon them by the chief of police, to make such reports, and it was their practice to do so. The policeman who noticed the condition of the stone did not make any entry of the defect, as the rule required him to do. On the evening of the accident, and two hours or more before it occurred, the attention of the night captain of police was called to the unsafe condition of the stone, and he examined it. Several persons who were accustomed to pass over the walk frequently had not noticed anything wrong with it before the accident.

Upon the question of actual notice, the court instructed the jury that notice to a policeman, or to the night captain of police, of the defective or unsafe condition of the side-

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walk in question was not sufficient to charge the city with actual knowledge of such condition; and in other instructions the jury were told that actual notice must be to the properly constituted officers of the city having charge of the streets and sidewalks.

We do not doubt that notice of the condition of the stone to an officer or agent of the city not charged with any duty respecting it, and who was not the representative of the city concerning any matter of that kind, would not constitute actual notice to the city; but if the officer receiving the notice was charged with a duty to act concerning the defect, and to set in motion the agencies for its repair, we do not think that the fact of his being also a policeman, would affect the question of notice. The same person may be authorized to perform duties in different departments on behalf of a city, and no reason occurs to us why a city may not authorize and direct police officers to inspect sidewalks and report defects to be repaired. The evidence tended to prove that the policemen of the city had been directed to perform, and had been in the habit of performing, as a part of their duties to the city, the reporting of such defects under circumstances and in a way implying notice to the general officers of the city that they were acting for the city in that department. The record seems to have been publicly kept at the police station. In the case of *City of Chicago v. Hoy*, 75 Ill. 530, notice to a policeman of an obstruction in the street consisting of a dead horse, was held to be notice to the city where it was made the duty of the police to report and enter in a book in the police station all animals found dead by them. We think that the jury were incorrectly instructed on that question, and that it was not necessary that a policeman should be formally constituted or entitled as an officer of the street department in order to receive notice of a matter within the scope of his duties. If the police were charged with the duty which they had been performing with respect to sidewalks by the direction, or with the knowledge and approval of those having general charge of the affairs of the city, we think that notice to one

of their number would be notice to the city. Otherwise a person might perform all the duties of an officer, and be a *de facto* officer, and yet be incapable of receiving notice.

The first and third instructions for defendant were also objectionable. The first was argumentative and both gave the jury to understand that the standard of care exacted of the defendant in the inspection of its sidewalks, was the same as that to be expected of the casual passer by. The standard of diligence is not the same, and the difference is constantly recognized in the adjudged cases, where persons passing over walks with the duty of observing ordinary care for their own safety, are held to have exercised such care although not perceiving a defect, while the municipal corporation is considered negligent in not discovering it. It can not be said, as a matter of law, that those charged with a duty for the safety of the public have discharged that duty by exercising the care to be expected of those having no such duty.

The judgment will be reversed and the cause remanded.

Helmuth et al. v. Bell et al.

1. *Parties Litigant—Minors by Their Next Friend or Guardian.*—The objection that the suit was improperly brought by minors in not suing by their next friend or guardian, can not be taken advantage of for the first time in the Appellate Court. The objection should have been raised in the court below before the trial.

2. *Bill of Exceptions—Inference from its Absence.*—In the absence of a bill of exceptions everything depending upon the evidence is inferred in favor of the verdict.

3. *Verdicts.*—In a suit brought under the Dram Shop Act, the jury returned the following verdict: "We find the defendants guilty, as charged in the declaration, and assess plaintiff's damages at \$5,000: \$1,500 to Sarah Bell and \$700 each to Lucinda Bell, Hugh Bell, Mary Bell, Sarah Bell and John Bell. *It was held*, no objection having been taken to it in the trial court, that the form of the verdict was not injurious to the defendants; it was in the gross sum of \$5,000, and the finding of the jury as to how it should be distributed between the plaintiffs did not concern the defendants.

49	626
150s	263
49	626
80	346

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4. *Parties—Misjoinder of Plaintiffs.*—A misjoinder of parties plaintiff should be taken advantage of by demurrer, plea in abatement, or at least by a motion in arrest of judgment in the trial court. It comes too late when made for the first time upon error in the Appellate Court.

5. *Dram Shops—Parties in Action for Damages.*—It seems that under Sec. 9 of the Dram Shop Act, allowing a joint or several action to be brought, the person or persons entitled to the action may sue jointly. The fact, whether they can or not, is a mere technicality of law, and should be taken advantage of, if at all, in apt time. Where all join, a multiplicity of suit is avoided and no damage done to the defendants, because in the distribution of the property among the plaintiffs, the defendant is an indifferent party.

6. *Parties—Actions Under the Dram Shop Act.*—An action under Sec. 9 of Chap. 43, R. S., commonly called the Dram Shop Act, was brought against two defendants jointly. The declaration charged one of the defendants with the sale of the liquors in question, and in order to fix the liability of the other, it was charged that the building in which the liquors were sold was the joint property of both, and jointly occupied by them, and that both knowingly permitted the premises so occupied by them to be used and occupied for the sale of intoxicating liquors therein. *It was held*, that the declaration was good as to both.

7. *Bill of Exceptions—Its Office.*—In case there is no bill of exceptions the Appellate Court can not inquire as to the evidence, or the ruling in refusing a motion for a new trial.

Memorandum.—Action in case under the Dram Shop Act. Plea of not guilty. Judgment for plaintiffs. Error by the defendant to the City Court of Aurora; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE CASE.

This is an action in case under chapter 43, R. S., commonly called the Dram Shop Act, by Sarah Bell, a widow, and her five minor children, who were joined with her as co-plaintiffs to recover damages. Arthur Bell, the husband and father, was accidentally drowned, and the plaintiffs charged that his death was caused by liquor sold him by the defendant Jacob Helmuth, the other defendant, Albertina Helmuth, being charged as the owner of the premises. A trial was had, which resulted in a verdict against the defendants, and judgment rendered thereon. The defendants bring the case to this court upon a writ of error.

PLAINTIFFS' BRIEF, LITTLE & AVERY AND ALSHULER &
MURPHY, ATTORNEYS.

In the States of Ohio and Indiana, whose statutes in this regard are like our own, the courts have held that the term "jointly or severally," as used in the statute applied to the defendant, and authorized the bringing of one suit against any number of persons contributing to the injury or intoxication. *Rantz v. Barnes*, 40 O. St. 45; *Davis v. Justice*, 31 O. St. 369; *Barnaby v. Wood*, 50 Ind. 407; *English v. Beard*, 51 Ind. 489; *Baker v. McCoy*, 58 Ind. 220; *Delfel v. Hanson et al.*, 2 Wash. 194, 26 Pac. Rep. 220; *Durein et al. v. Pontious*, 34 Kan. 353.

If a misjoinder of parties plaintiff appear from the face of the plaintiffs' pleadings, the defendant may bring error, as has here been done. *Saunders on Pl. and Ev.*, 11, tit. Misjoinder, citing 2 *Saun.* 115-116; *Cook v. Bachelor*, 3 B. & P. 150; 1 *Roll. Ab.*, 31 Pl.; *Vaux v. Stewart*, Sty. 156; *Sands v. Childs*, 3 *Lev.* 352.

DEFENDANTS' BRIEF, B. F. HERRINGTON, ATTORNEY.

In the absence of a bill of exceptions, everything is to be presumed in favor of the action of the court below. *Smith v. Gilman*, 38 Ill. App. 393. Where there is no bill of exceptions the court can not inquire as to the evidence nor ruling in refusing a motion for a new trial. *Knott v. Swannell*, 91 Ill. 25.

Objection to form of the verdict must be made in the court below. *Moss v. Village of Oakland*, 88 Ill. 109; *Knowlton v. Fritz*, 5 *Brad.* 217.

It can not be made for first time in Appellate Court. *Schlencker v. Risley*, 3 *Scam.* 483; *State Bank v. Batty*, 4 *Scam.* 200; *Parmelee v. Smith*, 21 Ill. 623; *Davis v. The People*, 50 Ill. 199.

Surplusage will not vitiate a verdict. *Armstrong v. People*, 37 Ill. 459.

Informality should not vitiate, where the verdict does substantial justice, and the party against whom it is rendered

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shows no merits. *Bates v. Williams*, 43 Ill. 494; *James v. Morey*, 44 Ill. 352.

A widow and her children, constituting one family, may join in an action for loss of means of support caused by the intoxication of the husband and father, against those who sold him the liquor. *Jones v. Bates*, 26 Neb. 693; *Kerkow v. Bauer*, 15 Neb. 150.

OPINION OF THE COURT, LACEY, J.

This was an action in case brought by the defendants in error, Sarah Bell, the wife of Arthur Bell, deceased, Lucinda E. Bell, Hugh Bell, Mary Bell, Sarah Bell, and Jane A. Bell, the minor children of the said Sarah Bell and Arthur Bell, deceased, in the Circuit Court of Kendall County, against the plaintiffs in error, Jacob Helmuth and Albertina Helmuth, afterward removed by change of venue to the City Court of Aurora, Kane County, where it was tried, resulting in a verdict of \$5,000 against the defendants, upon which judgment was rendered by the court. From such judgment this writ of error is sued out. The action was brought under the Dram Shop Act. The declaration containing seven counts, six of the counts charge Jacob Helmuth of being engaged in the retail traffic in intoxicating liquors in the village of Yorkville and on the 16th day of May, 1890, sold, gave and furnished to the deceased, Arthur Bell, and thereby causing the said Bell to become so intoxicated that he was cast out of a boat in which he was riding on Fox river by reason of such intoxication and was drowned; and also in some of the counts of the declaration charging the sales of the intoxicating liquors to have been made to one James Wilcox, who became intoxicated and assumed the management of the boat, and the said Arthur Bell, who was also then in and upon the boat, being upon the said stream of water, and the said Wilcox in consequence of such intoxication was unable to manage or control the said boat, and did not properly manage and control it, and in consequence of the said intoxication caused the said boat to rock, sway and tip and become unmanageable,

and as a consequence the said Wilcox, one Frank Griffith, who was also on the boat, and the deceased, Bell, were all thrown out of the boat and were drowned. As an addition to all the counts of the declaration, in order to connect Albertina Helmuth and make her responsible with her co-plaintiff in error, it is charged that during all the time that Jacob Helmuth was engaged in the retail traffic of intoxicating liquors in a certain building, then and there occupied and owned by the plaintiffs in error, situated in the said village of Yorkville and known as the City Hotel, describing it as on a certain lot in the village, she was the owner thereof with the said Jacob Helmuth and with him occupied the same, and during the time they so owned and occupied the same the said Jacob Helmuth gave and furnished the intoxicating liquors that caused the death of the said Arthur Bell in manner as charged in the declaration, and that both the plaintiffs in error knowingly permitted the premises so occupied by them to be used and occupied as aforesaid for the sale of intoxicating liquors therein. The suit was instituted to recover damages to the means of support of the defendants in error as the widow and children of Arthur Bell, deceased, who were left by the death of the said Arthur Bell without any means of support. The verdict of the jury was in the following form, to-wit: "We find the defendants guilty as charged in the declaration, and assess plaintiffs' damages at the sum of \$5,000—\$1,500 to Sarah Bell, and \$700 each to Lucinda Bell, Hugh Bell, Mary Bell, Sarah Bell and Jane A. Bell." Motion was made by plaintiffs in error for a new trial, which motion was denied and exceptions taken. The court then rendered judgment upon the verdict against the plaintiff in error for \$5,000, and ordered that sum to be divided between the defendants in error according to the terms of the verdict.

The defendants, now plaintiffs in error, before issue joined, demurred to the declaration, which demurrer was overruled, and the plaintiffs in error pleaded not guilty. The only errors assigned in this court are, that the court erred in overruling the demurrer to the declaration and the

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amended declaration, and receiving and entering the verdict of the jury, and in denying the motion for a new trial and rendering judgment on the verdict, and that the verdict and judgment were generally erroneous. There was no bill of exceptions preserved in the record. It is complained in the first place by counsel for plaintiffs in error, that the suit was improperly brought by the minors in not suing by their next friend or guardian. This objection comes too late; such fact can not be taken advantage of the first time in this court. It should have been done in the court below before trial. If the objection had been made in apt time, a next friend or guardian could have been appointed by the court, the declaration amended, and the trial could have proceeded; nothing of the kind was done. It has been decided by the Supreme Court of this State, that an infant may sue out a writ of error in his own name and his proceeding in his own name can not be taken advantage of after the opposite party has joined in error. *McClay, Admr., et al. v. Norris*, 4 Gil. 370. Again, in order to sustain a verdict we would presume that the evidence showed that all were adults, dependent upon the deceased for support, and that the evidence sustained such claim. The declaration averring minority was not a material matter and may have been disproved on the trial. In the absence of a bill of exceptions everything depending upon the evidence is inferred in favor of the verdict. The statute provides (section 9 of the Dram Shop Act, chapter 43 R. S.) that "all damages recovered by a minor under this act shall be paid either to such minor or to his or her parent, guardian or next friend as the court shall so direct." So that the plaintiffs in error will be entirely protected by the order of the court in distributing the money.

The verdict was not excepted to by plaintiffs in error on account of informality, but aside to there being no exception to the verdict at the time it was brought into court, the form of it was not injurious to plaintiffs in error; it was in a gross sum of \$5,000, and the finding by the jury as to how this sum should be distributed between the plaintiffs below

did not concern the plaintiffs in error in the least; it was immaterial to them. It is complained by counsel for plaintiffs in error that under section 9 of the Dram Shop Act, allowing a joint and several action to be brought refers to the defendants alone and not to the plaintiffs, and that the widow and minor children can not join in the same action, and the cases of *Delfel v. Hampton et al.*, 2 Wash. Rep. 194, 26 Pac. Rep. 220, and *Durain et al. v. Pompilus*, 34 Kan. 350, rendered under a similar statute, holding that such plaintiff can not be joined, are cited.

Without, however, deciding this point, we think this objection comes too late. A misjoinder of parties plaintiff should be taken advantage of by demurrer, plea in abatement, or at least, by a motion in arrest of judgment. In this case, a demurrer was interposed to the declaration and overruled by the court, which prohibited the plaintiff in error from moving in arrest of judgment. This was expressly decided in the case of *C. & E. I. R. R. Co. v. Hines, Admx.*, 132 Ill. 161. We think also, a party being prohibited from moving in arrest of judgment, could not assign for error, the misjoinder of parties on writ of error to the Appellate Court. In this case, whether or not the plaintiffs, could sue jointly, is a mere technicality of law, and should be taken advantage of, if at all, in apt time. There are many reasons why the plaintiffs in this class of cases should be allowed to sue jointly, especially the wife and minor children, who sue to recover loss to their means of support, they each having an undoubted cause of action. If all should join in a suit, a multiplicity of suits would be avoided and no damage done to the defendants, because as to the distribution of the money among the plaintiffs, the defendant is an indifferent party. It might be, if the declaration were so defective as not to sustain a cause of action, that advantage could be taken of it on a writ of error to the Appellate Court, even in a case where a demurrer had been overruled to the declaration, and the defendant pleaded over, (*C. & E. I. R. R. Co. v. Hines, supra.*) but that is not this case; nothing but a misjoinder is charged. It is also claimed that there is a mis-

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joinder of counts in the declaration, as the plaintiff in error, Albertina Helmuth, was not connected with Jacob Helmuth by proper averment in some of them. This, also, we think, could not be assigned for error for the same reason as given in the case of misjoinder of parties; and again under court practice act, if any counts of the declaration are so defective as not to support the judgment, and that is all that can be said of any of the counts, the court may disregard the faulty counts and render judgment thereon for the plaintiffs. Chap. 110, Sec. 58, R. S. (Hurd's, 1891); Smalley v. Edey, 19 Ill. 211; People v. Spring Valley, 129 Ill. 178; C. & E. I. R. R. Co. v. Hines, *supra*. We think, however, the counts were good as to both by an averment connecting Albertina Helmuth with the liability of Jacob Helmuth as charged in all counts.

In case there is no bill of exception, this court can not inquire as to the evidence nor ruling in refusing a motion for a new trial. Knott v. Swennel, 91 Ill. 25.

Perceiving no errors in the record, the judgment of the court below is affirmed.

Great Western Telegraph Co., Use of, etc., v. Haight.

1. *Contracts of Subscription*.—Upon the execution of a contract of subscription for stock, mutual rights arise between the subscribers in their relation to each other, by reason of which they are to reap the benefits, or share the burdens of the enterprise.

2. *Corporations—Subscription of Stock for the Purpose of Enabling the Corporation to Procure Other Subscriptions*.—Where a person subscribed to the capital stock of an incorporated company for the purpose of giving the agent for the company a start, and enabling him to procure other subscribers, *it was held*, that he held himself out as a stockholder, and authorized the agent to so represent him, and that he could not lawfully withdraw his subscription by reason of an agreed arrangement which he had with the agent for that purpose.

3. *Corporations—Liability of Stockholders—Canceled Subscriptions*.—The defendant signed a contract of subscription for 100 shares of the capital stock of the corporation, at the instance of the agent of the cor-

poration, soliciting subscriptions for the purpose of enabling the agent to obtain other subscriptions to the stock. It was agreed orally between the defendant and the agent, at the time, that he should have the privilege of erasing his name afterward, if he did not want the stock. After the agent had procured other subscriptions the defendant was permitted to erase his subscription according to the agreement. Some years afterward, the corporation becoming insolvent, a receiver was appointed, and suit was brought upon the subscriptions. *It was held*, that the receiver was entitled to recover the amount of the subscriptions, and that the arrangement between the defendant and the agent was in law a fraud upon the other subscribers.

Memorandum.—Action upon a contract of subscription. Pleas: General issue sworn to; statute limitations. Appeal from the Circuit Court of LaSalle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

STATEMENT OF THE CASE.

This action was brought to recover an alleged subscription to the stock of the plaintiff, being 100 shares, and according to a decree of assessment rendered July 10, 1886, by the Circuit Court of Cook County, Illinois, in the case of Terwilliger et al. v. The Great Western Telegraph Co. et al., by which the stockholders of the plaintiff, including the defendant, were required to pay to it the sum of \$8.75 upon each share of stock held by them, for the payment of the debts of the plaintiff.

APPELLANT'S BRIEF, THOMAS J. SUTHERLAND AND LESTER H. STRAWN, ATTORNEYS.

Whether the subscription had been given to lure others, or whether the defendant had an agreement with the agent to withdraw it at a later date, or whatever else he may have agreed with the agent, if he subscribed the contract, and others subscribed after him, with no notice that his subscription was invalid or conditional, he is bound, according to the written contract he signed, and subsequent cancellation by him will be without effect on his liability. This well-settled principle of the law rests upon equitable estoppel. No man in court shall be permitted to benefit by his

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own wrongdoing. Independent of any alleged agreement with the agent, the defendant was bound to know that others would subscribe after him, possibly relying upon his name, and if he was allowed at a later date to withdraw, it would amount to a palpable fraud upon them. With or without an agreement with the agent in such a case, the application of the law is unchanged. 2 Beach on Priv. Corp., Sec. 538; Jewett v. Railway Co., 34 Ohio St. 601; White Mts. R. Co. v. Eastman, 34 N. H. 124; Blodgett v. Morrill, 20 Vt. 514; Jackson v. Duchaire, 3 T. R. 551; Conn. & Pass. R. R. Co. v. Bailey, 24 Vt. 476; East Tenn. & Va. R. R. Co. v. Gammon, 5 Sneed (Tenn.), 568; Kennebec & P. R. R. Co. v. Waters, 34 Me. 369; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Martin v. Pen. & G. R. Co. 8 Fla. 382; New Albany & S. R. R. Co. v. Fields, 10 Ind. 187; Anderson v. R. R. Co., 12 Ind. 376; Jewell v. Rock River Paper Co., 101 Ill. 66; Miller v. Hanover Junc. & Sus. R. R. Co., 87 Pa. St. 98.

An escrow is an obligatory writing, delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, and thus to be delivered by the depositary to the obligee, when it becomes of full force and effect. 6 Am. and Eng. Enc. of Law, 857. It must be delivered to a stranger, and the condition mentioned. Raymond v. Smith, 5 Conn. 559.

The defense of want of consideration, or of failure of consideration, must be interposed on the part of defendant by special plea; and the burden of its support at the trial rests upon him. R. S. of Ill., Chap. 98, Sec. 9; Wilson v. King, 83 Ill. 236; Goodwin v. Goodwin, 65 Ill. 498-9.

APPELLEE'S BRIEF, MAYO & WIDMER, ATTORNEYS.

The criterion of the liability of the subscriber is, whether anything has been done by which the corporation could be forced to receive him as a member. Ang. & Ames on Corp., Sec. 527; Carlisle v. Saginaw, etc., R. R. Co., 27 Mich. 318; Nor. Cent. Mich. R. R. Co. v. Eslow, 40 Mich. 222.

An agent who solicits subscriptions may hold them in escrow. There is no such personal identity between a company and its officers as to prevent or preclude a delivery to the latter as an escrow. *Cass v. Pittsburgh, etc., R. R. Co.*, 80 Pa. St. 31; *So. Life Ins. Co. v. Cole*, 4 Fla. 359; *Bank v. Bailhache*, 65 Cal. 327.

OPINION OF THE COURT, CARTWRIGHT, J.

This suit was brought by appellant against appellee to recover from him upon an alleged subscription for one hundred shares of stock of appellant. The declaration set out a contract of subscription, an assessment by the Circuit Court of Cook County, Illinois, in a proceeding in that court, against the plaintiff, of \$8.75 on each share of stock not fully paid for, and a demand from defendant of the amount so assessed before bringing suit. The issues upon which the case was tried were made by pleas of the general issue, sworn to, and the statute of limitations of sixteen years. Plaintiff proved that defendant signed a contract of subscription for one hundred shares of the capital stock of plaintiff, contained in a subscription book prepared for numerous subscriptions, and ruled in columns for names and residences of subscribers, dates of subscriptions and numbers of shares, and delivered the same to the agent of plaintiff soliciting subscriptions. The subscription appeared to have been erased with pen and ink, and it appeared that about two weeks after the subscription was made, and after eight or ten other persons had subscribed for shares in the same book, following such subscription of defendant, he obtained from the agent the book and made the erasure. The book was then returned to the agent and passed to plaintiff, where it remained until a receiver was appointed, who took and has retained possession of it. The court permitted defendant, against the objection of plaintiff, to testify that the agent soliciting subscriptions applied to defendant to subscribe for stock, and after urging him to put his name down so that the agent could get a start and go to work in that town, it was orally agreed that defendant should have

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the privilege of afterward erasing his name, if he did not want the stock, and that the erasure was made in pursuance of such agreement. The defendant was a banker, and the influence of his example would doubtless be great in obtaining other subscriptions. The agent, while procuring subscriptions, made the bank a sort of headquarters, and, about the time of defendant's subscribing, arranged with him to act as agent in collecting assessments from the other subscribers, which he afterward did. The subscription being offered in evidence, together with the decree making the assessment and the demand, the court excluded the subscription and assessment, and admitted the demand. Thereupon the court directed the jury to return a verdict for defendant, which was done, and judgment was entered against plaintiff for costs.

We think that the action of the court was wrong. Upon the execution of contracts of subscription for stock mutual rights arise between the subscribers in their relation to each other, by virtue of which they are to reap the benefits or share the burdens of the enterprise. By his subscription, made for the purpose of giving the agent a start and enabling him to procure other subscriptions, the defendant held himself out as a stockholder, and authorized the agent to so represent him. The burdens of other stockholders would be increased by the withdrawal of his subscription, and the alleged secret arrangement for so doing was a fraud on them, of which defendant could not be permitted to avail himself.

In *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, where there was an agreement for such a withdrawal, the court said: "All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits, and subject to the same burdens. In the subscription of each person, every other subscriber has a direct interest. There purported here to have been a large amount of stock taken, whereas, in fact, there was really no stock taken—the issue of the shares to Cushman and Hardin being coupled with the right on their part to surrender them, and take back their money. Such

a private arrangement with an individual subscriber, although it may not be intended, is, in law, a fraud upon the other subscribers, and such agreement will be disregarded, and the party be held bound to all the responsibilities of a *bona fide* subscriber. This is the doctrine, as we regard, abundantly established by judicial decisions."

The court there cite and comment on the cases of *Blodgett v. Morrill*, 20 Vt. 509; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Robinson v. Pittsburgh and Connellsville R. R. Co.*, 32 Penn. St. 334; *Graff v. Pittsburgh and Steubenville R. R. Co.*, 31 Penn. St. 489; *Stanhope's case*, 1 Law Reports; 1 Chancery Appeals, 161; *Minor v. The Bank of Alexandria*, 1 Pet. 65; and other cases where the same doctrines are announced. In *Jewell v. Rock River Paper Co.*, 101 Ill. 57, it is said to be well known, that in becoming a party to a stock subscription one is generally controlled, in a large degree, by the character of those who are, or who are expected to be identified with it, and it is held, that any artifice or trick, tending to mislead a subscriber in this respect, would be highly reprehensible in morals, as well as a legal fraud, and that to permit a subscriber to be exonerated by private understandings with the subscription agent, would be to sanction a palpable fraud upon creditors and other stockholders. In *Corwith v. Culver*, 69 Ill. 502, it was held that a secret condition attached to a subscription would be a fraud upon the other subscribers, and the subscription should be enforced without regard to it. See also *Foy v. Blackstone*, 31 Ill. 538; *G. & S. W. R. R. Co. v. Ennor*, 116 Ill. 55.

The subscription of the defendant was unconditional in its terms, and there was no notice to other subscribers that he had a privilege of withdrawal. Each other subscriber had a direct interest in his subscription, and a right to have it remain as it was when such other subscriber saw it, for the purpose of bearing future burdens, for which the assessment has since been made. A defense consisting merely of a fraud against those rights should not prevail. 1 Morawetz on Private Corporations, Sec. 303.

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It was argued that the subscription was not delivered to the plaintiff until after the erasure, and therefore was never an executed contract of subscription, and this upon the ground that it remained in the hands of the subscription agent until after the erasure. The evidence shows that he was the agent of the plaintiff, to solicit and receive subscriptions to stock, and the delivery to him was a delivery to plaintiff. The fact that he consented to and participated in the attempted fraud, by returning the book for the purpose of erasure, can make no difference.

It is also contended that it was incumbent on plaintiff to prove that at the time defendant's subscription was made, it had stock to dispose of which might be subscribed for, and that the presumption under its charter was that it had not, and therefore there was no consideration for the subscription. The question of want of consideration was not made an issue by the pleadings, and was not before the court. A contract of subscription like this has been held to be a promissory note. *White v. Smith*, 77 Ill. 351; *Goshen Turnpike Co. v. Hurin*, 9 Johns. 217. A want of consideration should have been pleaded, if it was sought to raise that question.

The judgment will be reversed and the cause remanded.

49	639
53	574

Lyon v. Howard S. Taylor for the use of H. Worcester.

1. *Pleading—Demurrer to Special Pleas.*—It is not error to sustain a demurrer to a special plea, where the whole question can be litigated under the general issue, and all the evidence that could have been introduced under the special plea was admitted in evidence under the general issue, and the case fully considered under the facts by the court.

2. *Agency.*—If a person hold himself out to be acting as the agent and for the benefit of and for the signers of a syndicate, the law will not permit him to repudiate his agency and speculate out of the partners of such signers in a matter in which they all have a common interest.

3. *Agency—Right of an Agent to Speculate out of his Principal.*—An agent has no right to speculate out of his principal, and where he purchased

a piece of property for his principal, even if authorized to pay a certain price, he has no right to purchase it at a less price and claim the difference as his own. The principal has a right under such circumstances to the benefit of the more favorable price for which the property is bought.

4. *Practice—Suits for the Use of Another—Motion to Dismiss.*—O. L. made a note payable to T. and T. indorsed to W. for collection. W. brought a suit in the name of T. for his use, and T. moved to dismiss the suit; thereupon, leave was granted by the court to W. to file a bond to indemnify the said T., which was accordingly filed, and the court overruled the motion to dismiss the suit. *It was held*, that as such suit was being prosecuted in the name of T., the payee of the note, and not in the name of W., the assignee, the court correctly decided the motion, so far as the motion is concerned.

Memorandum.—Assumpsit on promissory note. Pleas: General issue and denial of assignment. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, M. B. & F. S. LOOMIS, ATTORNEYS.

Taylor, the trustee, had no authority to indorse or turn over one of these notes to Worcester. He was holding them in a fiduciary capacity, with express and repeated instructions not to let them go out of his hands. They were payable only to him, not even to his order, and were made non-negotiable, with the consent and at the suggestion of Worcester himself, so that they should not be transferred to any one else. Under such circumstances the indorsement and delivery of the note sued upon by Taylor to Worcester, was a breach of the trust confided in Taylor, and a fraud upon the rights of appellant. Such an agreement, or transfer, being a breach of trust, will not be enforced. *Perry on Trusts*, Sec. 787; *Ord v. Noel*, 5 Mad. 438; *Wood v. Richardson*, 4 Beav. 174; *Mortlock v. Buller*, 10 Ves. 315; *Dawes v. Betts*, 12 Jur. 709.

It may be laid down generally, that the rules of the court are the rules of honesty and fair dealing, and that no party to an illegal or fraudulent contract can derive any

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benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds. Lewin on Trusts, 862; Lathrop v. Bampton, 31 Cal. 17. The rights of the *cestui que trust* can not be impaired by a conveyance of the trustee to a third party, for a different purpose than that declared by the trust, and when the purchaser is affected with notice of the facts which in law constitute the breach of trust, the transfer is void as to him. Swift v. Castle, 23 Ill. 209; Shepherd v. McEvers, 4 Johns. C. (N. Y.) 136; Wormley v. Wormley, 8 Wheat. 421; Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299.

Notice of the trust before the conveyance converts the purchaser into a trustee. Perry on Trusts, Sec. 829. So, where trust money is followed into the hands of a person who receives it by collusion, or with express notice of the trust, he becomes himself a trustee. Perry on Trusts, Secs. 167, 840; Ernest v. Croysdill, 6 Jur. (N. S.) 740; Rolfe v. Gregory, 11 Jur. (N. S.) 97.

It will not be a sufficient answer to this position to say that although appellee got possession of the note by fraud, misrepresentation and concealment—although he made use of his confidential and fiduciary relation to the parties concerned for that purpose, yet this can not be made use of as a defense in an action at law, but resort must be had to equity. Even if appellee had the right originally to insist upon the question of fraud being litigated in a court of chancery, he waived that right when he went into the whole question in an action at law. Blanchard v. Brown, 3 Wall. 248.

But it is unquestionably true that fraud vitiates all acts between the parties, and is cognizable in a court of law as well as equity. Jamison v. Beaubien, 3 Scam. 113; Lowry v. Orr, 1 Gilm. 70; Rogers v. Brent, 5 Gilm. 573; Gregg v. Sayre, 8 Pet. 244; Swayze v. Burke, 12 Pet. 11.

WHEELER & HUNTER, attorneys for appellee.

OPINION OF THE COURT, LACEY, J.

This suit is an action of assumpsit based upon a promissory note given by appellant to appellee, in the sum of \$500, due in one year after date, with six per cent interest from date, not negotiable, dated January 1, 1891. The real date of the note, however, was May 9, 1891. Indorsed on the back of the note is payment for thirty dollars interest, and sixty dollars principal.

At the trial in the court below, Howard S. Taylor, the payee named in the note, moved to dismiss the suit. Thereupon leave was granted by the court to H. Worcester, to whom it had been indorsed for collection, to file a bond to indemnify the said Taylor, which was filed December 12, 1892, whereupon the court overruled the motion of said Taylor to dismiss the action. On the same day the appellant filed two additional special pleas, in addition to the general issue already filed, to which special pleas the court sustained a demurrer. Appellant abided his plea.

The jury was waived by agreement of the parties and the cause tried by the court.

A point is made by counsel for appellant, that the court erred in overruling the motion of Taylor to dismiss the suit, apparently under the mistaken idea that the suit was being prosecuted in the name of the usee, H. Worcester, arguing that the legal title did not pass to the usee.

We need not further comment upon this point than to say, that this suit is being prosecuted in the name of Taylor, the payee of the note, and not that of Worcester, to whom it was indorsed for collection; therefore, the authorities cited are not applicable. The court, therefore, decided correctly if the reason assigned by counsel for grounds for dismissal are the only ones that can be urged.

It is also urged that the court erred in sustaining the demurrer to appellant's special pleas. We do not deem it necessary to go into a consideration as to whether those pleas were good or not, for the reason that the whole question was litigated under the general issue and all the evidence that could have been introduced under the special pleas was admitted in evidence under the general issue, and

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the case fully considered on the facts by the court. *Cooke v. Preble et al.*, 80 Ill. 382. We shall therefore consider the case on its merits according to the evidence preserved in the record.

The defense consists in an allegation of fraud, that the usee, Worcester, and two others, is alleged to have perpetrated upon the appellant in certain land transactions in and about laying out certain town lots in the township of Thornton, county of Cook, and Harvey addition syndicate, or more particularly the purchase of forty acres of land on which the addition was laid out.

It appears from the evidence in this case that some time in October or November, Hannibal Worcester, the usee, a banker at Momence, Kankakee County, Illinois, J. Pembroke Bishop, a real estate operator in Chicago, and George M. Bennett, of Grant Park, Kankakee County, Illinois, conceived a scheme of forming a syndicate for the purpose of purchasing and subdividing for sale, a tract of land at South Harvey, Cook County, Illinois, consisting of eighty acres of land, a part of which is the land out of which transactions hereinafter mentioned arose and the note in question grew.

In the latter part of October, 1890, the parties named above commenced negotiations for the purchase of eighty acres of land, and on the 5th of November they had acquired by contract the west forty acres of the land near Harvey, and also had some kind of a contract or option purchase for the east forty, the record not disclosing the exact nature of it. The contract was made between Eugene Cary, the owner of the land, and H. A. Haynes, who had no interest in it and who was a lawyer in Bishop's office, and engaged in the latter's business; who made the contract in his own name, but really for the benefit of the three parties. He was to pay \$26,000 for the east forty, and the contract was written up and placed by both parties in the Illinois Trust and Savings Bank on November 5, 1890.

Worcester and his party placed a certified check of \$1,500 with the contract in the bank to be held as some kind of

security for the fulfillment of the contract of purchase, the exact nature of which is not disclosed by the evidence, except that the \$1,500 was not to be a present payment. As soon as these contracts were secured, Bishop, Worcester and Bennett started out to form a syndicate to whom they might sell this property for the purpose of laying it out into lots and selling it, Bishop, it appears, being an expert in such matters, having been engaged in that kind of business before. The proposition was to sell the land to a syndicate in shares at the rate of \$1,200 an acre or \$1,000 a share. It would take ninety-six shares at \$1,000 each to cover the eighty acres. They proceeded on that basis for a while, but succeeded in getting only seventy-two shares subscribed, and not having succeeded in getting shares enough subscribed they suggested that they would hold the balance of stock themselves. Some of the stockholders objected because they did not want the land incumbered. The first scheme was therefore abandoned, and they organized the syndicate proper on the east forty acres of the land, and the organization of the syndicate on that forty was perfected about November 24, 1890, and all the shares were retired except forty-eight. The deed was obtained from Cary to one Howard S. Taylor, on the 4th of March, 1891, with the intention of his becoming the trustee of the syndicate, which he did by resolution of the shareholders on the 13th of April, 1891. The terms of the subscription to the syndicate were that each subscriber should pay down \$500 in cash, and the balance on credit, and it appears from the evidence that at the time Taylor took the deed from Cary, this money was used by the three syndicate makers and Taylor, to pay off all the cash payments of purchase price up to that time of the forty acres of land, \$16,000, without applying the certified check of \$1,500 on the purchase money, or if it was applied, Bishop, Worcester and Bennett were reimbursed that sum. There was something over \$23,000 paid in by the shareholders in the syndicate, and the difference between that and the \$16,000 paid on the land was expended in various ways or kept by the three syndicate formers, not fully

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shown by the evidence. Taylor, at the time of receiving the deed from Cary, executed his note for \$10,000 to the latter, together with a mortgage on the east forty to secure it.

On April 20, 1891, Worcester and Bishop made a trade by which Bishop turned over to Worcester all of his equity in \$24,000 of deferred payments, which the contract declared was owing from a certain syndicate which had purchased the east half of the above described eighty acres, and which said deferred payments, as the contract recited, were payable to the trustee of the syndicate. Bishop, the party of the first part named in the contract, was to assume the payment of all commissions due L. O. Gilliland, earned in acting as broker for the purchase of said property, and was to be allowed to retain \$1,474.63, then in his possession.

Worcester agreed to and gave a quit claim deed to the west half of the eighty to Bishop. This eliminated Bishop's interest from the syndicate in question and Worcester's interest in Bishop's half of the eighty. Bennett, previous to this, had sold out his interest to Worcester and Bishop. Bishop was elected one of the directors of the syndicate, and as one of the executive committee with Ed. Lyons and Worcester, and also was agent for the sale of the lots and continued to take an active part as one of the executive committee of the syndicate. Worcester now having become the owner of the \$2,400, as he supposed, commenced to plan some means of collecting it out of the shareholders as it was suggested, and a plan was fixed upon to get the different shareholders to give their individual notes payable to Taylor, the trustee, so that Worcester might get possession of them and collect them, if it became necessary, that is, if the hopes of the shareholders to sell enough of the lots to pay off all the indebtedness and relieve them from paying their deferred payments were not realized.

It may be stated here that the evidence shows that the appellant and nearly all, if not quite all, of the members of the syndicate were entirely ignorant, up to this time, that any of this indebtedness was claimed by Worcester, or that he

was seeking to collect it for his own benefit. This fact was studiously concealed from the shareholders.

In pursuance of the plan of procuring the personal notes of the shareholders, a meeting of the directors was called in Chicago, April 13, 1891, and a resolution was adopted instructing Taylor, the trustee, to procure non-negotiable notes to secure the balance of the payments. Consequently, on April 28th, after the trade between Bishop and Worcester, under the direction of Bishop, a circular was composed and signed by Bishop, by which the stockholders were notified to come in and give their notes for the deferred payments on their shares, according to the resolution. The circular bore date April 28, 1891. It was a peculiarly oily and plausible composition. It told the shareholders that the Harvey addition syndicate was complete, and that all the shares had been taken; that the sale of lots had commenced and that, as they had been informed when they had purchased their respective shares, it was confidently believed that their notes would never be presented for collection, "as we (the subscribers) expect that the income from the sale of the lots will more than meet the deferred payments by the time that they become due. Still, it is necessary to the welfare of each member of the syndicate, that the entire syndicate shall be secured against all contingencies and the board of directors has accordingly ordered that the deferred payments of each member be evidenced by notes at this time."

It will be noticed that there was not a word said in this circular about any part of the notes being desired for the benefit of Worcester, which was the real purpose. At a meeting of the stockholders at Grand Park, May 9, 1892, where were present, Taylor, the trustee, and Worcester, it was explained to the shareholders of the syndicate that it was necessary that these notes should be given for the protection of Taylor, who had given his notes for \$10,000 to Judge Cary, to secure the deferred payments on the land, and they were appealed to to assist him or reimburse him in case the land did not sell. Worcester also said that "Taylor has got to be protected by the syndicate."

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Not a word in all that meeting was said about Worcester having any claim.

The notes were then given as stated, the one in suit being one of them.

Shortly afterward Worcester procured all of the notes to be indorsed over to him by Taylor, for collection, excepting \$10,000 of them, which Taylor retained to secure himself against the Cary note, and afterward between \$3,000 and \$4,000, having been collected from parties purchasing lots of the syndicate, which, so far as the evidence shows, was all that was ever realized out of the grand scheme, and paid to Cary.

Worcester drew an equal amount of notes from Taylor, leaving in his hands only \$6,600.

Another fact appears—that while Worcester and Bishop held shares in the original intended organization, on the eighty acres, that when the reorganization took place on the forty, Worcester took no shares in the new syndicate, but afterward acquired a share. The above are the main facts in the case, except as to the attitude borne by Worcester, the *cestui que use*, and his two partners, to the balance of the syndicate in the transaction of the purchase of the land. They claim that they purchased it on their own account and sold it to the syndicate, while on the other hand the appellant through his attorney insists that they were purchasing the land as the agent of the syndicate and for its benefit, and so represented and ostensibly acted; that they sustained the fiduciary relation of an agent to his principal.

The proper decision of the case rests upon the determination of this question. Did the three men proposing the formation of the syndicate hold themselves out to be acting for the benefit of and for the signers of the syndicate? If they did, then the law would not permit them to repudiate such agency and speculate out of their partners in a matter in which they all had a common interest. We think the evidence on the part of the appellant clearly shows that they acted and pretended to act, in relation to the original purchase of the land, for the benefit and for the proposed syn-

dicatè at the time it was being formed, until it was finally disclosed, about the time of the commencement of this suit, that Worcester and his two associates were the owners of the land themselves, or at least had some kind of option on it at \$600 an acre, and were secretly and clandestinely unloading it upon the syndicate, of which appellant was one, at nearly double that amount. The evidence shows that the title to the land in question, or rather the contract for the purchase of it, was held by one Haines, the agent of Bishop, Worcester and Bennett; and that no one disclosed that these parties claimed to be the owners of the land out of which the syndicate was to be formed; and this fact was studiously and carefully concealed from the members of the proposed syndicate. It was represented to them that the land would cost them \$1,200 an acre, and they, the formers of the syndicate, would procure the title for that sum, not disclosing at the time that they themselves had control of the title at \$650 per acre.

It further appears that not a dollar had been advanced by them on the purchase of the land. They had only put up \$1,500 as a pledge. And finally, when the forty-eight signers of the syndicate had advanced \$23,000, this sum was used in payments for the purchase price of the land and the three parties were not out one dollar for it. It would be preposterous to suppose that if the signers of the syndicate had known that they were to pay for this land, and in addition, pay \$600 per acre to these three men, that they would ever have gone into such a transaction. It does not matter that they were told by the syndicate formers that the land would cost \$48,000, for the signers were led to believe that that was the least price which the men proposing the syndicate could procure it at. They represented that the title to the land was yet to be procured; that the land belonged to somebody in Iowa, and in order to hasten the formation of the syndicate, they represented that the owner was about to raise the price, which was entirely false. It is true that Bishop, Worcester and Bennett attempt, in a certain way in their evidence, to contradict the fact of their agency.

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Bishop testifies in his direct examination, that at the meeting of the syndicate November 24, 1890, he represented and stated to them that he was selling the land to them; that he never represented to any one but that *they* were selling the land to the syndicate. But on cross-examination, he could not remember to whom he made the statement, and could not say that he ever stated at any of the meetings of the stockholders or shareholders of the syndicate that he was selling the land to them, "not just in that way"—"never made the exact statement" that he was selling the land to them. So it appears from his own statements that he knew that the syndicate were laboring under the impression that he and the others were purchasing the land for the syndicate and not selling it to them as their own. Besides that, Bennett, one of the partners, testifies that Bishop, in the presence of Worcester, requested him not to divulge to any of the shareholders the price paid for the land.

Bennett swears that at no meeting of the board of directors or the syndicate, did he or Bishop or Worcester represent that they were buying the land for the syndicate. This we think is a mere evasion, for it is evident that the syndicate so understood it, and it was not necessary, in order to keep up the deception, for Bennett to make a positive statement of that kind to its members. If this was not the case, why was so much pains taken to secrete the fact that they were the real owners of the land and making the sale for their own benefit?

Worcester also swears that he never stated to appellant or any one else that he and his associates were buying for the syndicate. He says: "I told the members of the syndicate that the land would cost them \$1,200 an acre. I told them that the land cost them \$1,200 per acre." He further states that "Mr. Lyon (appellant) came to me at Momence one time and said he saw a notice in the paper of land in that vicinity at \$600 per acre. I told him there was a good deal of difference what the location of the land was." Mr. Worcester further admitted telling John C. Mater, who had been informed of the fact that the land only cost \$650 per

acre—"not to tell that around Momence and Kankakee, because the shares had been sold there for \$1,000 apiece;" that "if it was known that Mater was in on the ground floor it might raise a disturbance."

The evidence of these parties convinces us even more strongly that a gross fraud and deception was intended to be, and was practiced upon their associates in the syndicate; that Worcester and company, by their deep, underground, mole-like transactions, and by cunning and trickery, induced these parties to go into this scheme, ostensibly for the benefit of all, and by these means made them believe that they could and would procure the title, as their agents, or the agents of the syndicate about to be formed, for the lowest price for which it could be had, and that that was \$1,200 per acre; at the same time secreting the fact that they were the owners of or controlled the title, and that they were selling the land to them.

The law is that an agent has no right to speculate out of his principal and that where an agent purchases a piece of property for his principal, even if authorized to pay a certain price, he has no right to purchase it at a less price and claim the difference himself as his own. The principal has a right under such circumstances to the benefit of the more favorable price for which the property is bought.

In this case Worcester, the *cestui que use*, and his partners, having represented that the title of the property was in another, and led plaintiff and the other signers of the syndicate to believe that they would procure it for them for the benefit of the syndicate, they are in equity and good conscience estopped from afterward claiming that they themselves were the owners of the land and selling it on their own account. It is true, that a very few of the signers of the syndicate, at or after the syndicate had been formed, understood, or partly understood, the relation which Worcester and company bore to the title of the land, and the price they gave, but these parties were so informed by these men, for the purpose of using them as tools and assistants in carrying out the fraud intended, and being perpetrated upon

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the balance of the syndicate. In fact the evidence shows that the land in question was purchased with a view of selling it to, and unloading it upon a syndicate expected to be formed; that a very small amount of money was advanced and everything was carefully prepared for perpetrating the intended fraud which was afterward attempted to be carried out, in the manner of forming the syndicate in question. Worcester, who is using the name of Taylor, the trustee, to collect those notes for his own benefit, has no right to any of them. The notes which he holds all represent the illegal profits which he and his associates are attempting to realize by means of their fraudulent practices, and the note in question being one of them, is not collectible for his benefit, and neither is the nominal plaintiff, Taylor, attempting to do so, and moved the court below to dismiss the suit, which was refused, probably rightfully, at the time, but after the evidence was all introduced the court was enabled to see that the suit ought not to be prosecuted, and should have been dismissed on its own motion. There is a debt for which the land is legitimately pledged, for which Taylor, the payee of the notes, has given his personal notes to the grantor, for the payment of the purchase money, and these notes were given for the purpose of securing him against any sum he might be compelled to pay by reason thereof, and he as such trustee has a right to hold the notes for the purpose for which they were given, and in equity they should all be assessed *pro rata* to pay any subsequent defalcation that might arise as respects Taylor's claim. It would apparently not be proper to allow the appellant to defeat the action on the note for the above reason, for that would be a bar to any liability on it whatever.

Therefore the court below should have dismissed the present suit on the motion of Taylor, or on its own motion. Therefore the judgment of the court below is reversed, and the cause dismissed in this court, without prejudice to Taylor, the nominal plaintiff, in case hereafter he has any right to enforce the payment of any portion of the note sued on for his own benefit as trustee on his liabilities. Reversed.

Dunker, Executrix, v. Schlotsfeldt.

1. *Pleas and Proofs.—Variances.*—Under a declaration upon a promissory note alleged to have been executed by the defendant, and one J. H. S. to one H. E., and to have been assigned by H. E. to the plaintiff, a promissory note which does not appear to have been assigned by H. E., as alleged, is not admissible.

2. *Promissory Notes—Assignment—Right to Correct Indorsements.*—Where a payee of a promissory note assigned it to another person, and indorsed upon the back of it that he had received from such person full payment, *it was held*, that if, as a matter of fact, he had sold the note to the person named, and the indorsement appearing as a receipt was intended by him as an assignment, there could be no impropriety in his correcting it. It could be treated as an indorsement in blank, and corrected or filled out upon the trial.

3. *Accounts Sued On—Copies—Objections for Not Filing—When Too Late.*—Where a plaintiff fails to file a statement of the account sued on, the defendant may have the case continued for the term, or he may obtain a rule upon the plaintiff to file such statement. If he does not elect to do so, however, and pleads in bar, he can not raise the objection on the trial.

Memorandum.—Assumpsit on promissory note assigned, and common counts. Pleas, general issue, statute of limitation, denial of the assignment of the note. Appeal from the County Court of Rock Island County; the Hon. LUCIAN ADAMS, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, G. W. WOOD, ATTORNEY.

Indorsements and receipts on the back of a note are subject to explanation the same as in other cases. *Wing v. Beach*, 31 Ill. App. 78.

This is an action between one of the parties to the receipt or indorsement in question, and a third person, and in such a case the rule regarding the introduction of parol evidence to explain, vary or contradict a written instrument does not apply. *Needles v. Hanifan*, 11 Brad. 303.

The failure to file a statement of account sued on can

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only be taken advantage of by a motion for a continuance or by asking a rule for the plaintiff to file such a statement. *Stratton, Impl., etc., v. Henderson*, 26 Ill. 68. It is too late to make such objection after filing a plea in bar. *McCarthy v. Mooney*, 41 Ill. 300; *Chumasero v. Gilbert*, 26 Ill. 39.

JOSEPH L. HAAS and W. H. GEST, attorneys for appellee.

OPINION OF THE COURT, HARKER, P. J.

This is an action of assumpsit by Mary Dunker, as executrix of the last will, etc., of Mary Schlotfeldt, deceased, against appellee. There are three counts in the declaration. First. A special count upon a promissory note executed by the defendant and J. H. Schlotfeldt, to one Henry Empke, and alleged to have been assigned by Empke to Mary Schlotfeldt. Second. A common count for money had and received. Third. A common count for money paid out for the defendant's use at his request. A copy of the note sued on was filed, but there was no copy of an account filed.

Four pleas were filed. First. The general issue. Second. Ten years statute of limitation. Third. Five years statute of limitation. Fourth. A plea denying the assignment of the note.

Upon the trial, the plaintiff offered in evidence the following note, with indorsements:

"\$400. Moline, ILL., May 4, 1876.

One year after date, for value received, I promise to pay to the order of Henry Empke, the sum of four hundred dollars, with interest at ten per cent per annum, at the Moline National Bank.

JAMES F. SCHLOTFELDT.
J. H. SCHLOTFELDT."

(Indorsement on back of note.)

"Pay interest for 1877. Interest pay for the year 1878 and 1879. Interest pay for 1880 and 1881. Interest for 1882, 1883 and 1884, paid. The interest is pay up to May 4th, 1886. Sept. 14th, 1887. Int. on this note, \$24. Paid

to May 4th, 1887. May 3rd, 1888, rec'd on the within note, \$24 Int.

Received of Mrs. Mary Schlotsfeldt, four hundred and twelve dollars, in full payment of this note.

Molina, Nov. 21, 1888.

HENRY EMPKE.

May 9th, 1889, one year interest paid, \$24. One year's Int. paid, May 19th, 1890, \$24. Paid May 19th, 1890, \$24."

The court sustained an objection to the note.

The plaintiff then sought to establish her case under the common counts, and offered to produce Henry Empke as a witness for that purpose, but the defendant objected to the introduction of evidence under the common counts and the court sustained the objection.

The note was not admissible under the special count, for the reason that it did not appear to have been assigned by Empke, as alleged. The indorsements appearing on the back of the note were evidently made by an uneducated person. If, as a matter of fact, Empke sold the note to Mary Schlotsfeldt, and the indorsement appearing as a receipt was intended by him as an assignment, there could be no impropriety in his correcting it. The indorsement could be treated as an indorsement in blank, and corrected or filled out upon the trial. No offer to do so was made, however, and the court correctly sustained an objection to the note.

We can not understand why the court refused to allow the plaintiff to introduce evidence to establish her case under the common counts. She may have been able to do so independent of the note. If it were for the reason, as suggested by counsel in his brief, that no statement of the account sued on was filed with the declaration, the objection came too late. Where the plaintiff has failed to file a statement of account sued on, the defendant may have the cause continued for the term, or obtain a rule upon the plaintiff to file such statement. If he does not elect to do so, however, and pleads in bar, he can not raise the objection upon the trial. *McCarthy v. Mooney*, 41 Ill. 300.

For this error of the court the judgment must be reversed and the cause remanded.

Rutt v. Shuler.

Rutt v. Shuler, Administrator, etc.

1. *Fraudulent Conveyances—Secret Trusts.*—A person against whom a judgment was recovered, sold his real estate for its full value to his son, and being a widower, advanced in years, called together his children, and in consideration of their verbal agreement to support him so long as he should live, made a distribution of his property among them. *It was held* that this distribution of his property was fraudulent as to creditors, whether done for the purpose of hindering and delaying his creditors, or in good faith.

2. *Debtor and Creditor—Fraudulent Transfer of Property.*—A debtor can not dispose of his property in secret trust for himself so as to defeat existing creditors in the collection of their debts. Although such a transaction may have a valuable consideration, it is fraudulent as to creditors, because it places beyond their reach a valuable right, and gives to the debtor the enjoyment of what rightfully belongs to them. It is wholly immaterial in such a case to show that no actual fraud was intended, for the result would be the same.

3. *Fraudulent Conveyances—What is Not.*—A judgment debtor being the owner of real estate, sold it to his son for the full value, and having received payment for the same, distributed the proceeds among his children in consideration of their agreement to support him. *It was held*, that the conveyance of the real estate was not fraudulent as to judgment creditors, and a decree making it subject to the judgment and execution was reversed, it not appearing that the agreement between the father and the children entered into the consideration for the conveyance.

Memorandum.—Bill in aid of execution. Decree for complainants. Appeal from the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

A. A. WOLFERSPERGER, attorney for appellant.

J. E. MCPHERRAN, attorney for appellee.

OPINION OF THE COURT, HARKER, P. J.

On the 18th of May, 1891, appellee, administrator of the estate of William H. Whipple, recovered a judgment in the

Circuit Court of Whiteside County against Samuel R. Rutt and John W. Rutt for the sum of \$1,240. Execution was issued, and because of the sheriff's inability to collect, was returned not satisfied.

At the October term, 1891, appellee filed his bill in the Circuit Court in aid of execution, charging that John W. Rutt and Samuel R. Rutt had made fraudulent transfers of property for the purpose of defeating the collection of said judgment. Afterward, at the February term, 1892, he filed a supplemental bill joining Jonathan R. Rutt, Martin Rutt and Michael Rutt, as defendants, and charging that John W. Rutt, for the purpose of defeating the collection of the judgment, had made a fraudulent disposition of all his personal property by gift to his children, the other defendants, and that he had fraudulently conveyed to his son Jonathan R. Rutt, lot six, in block four, in E. D. LeFever's addition to the city of Sterling. The defendants answered, denying all the allegations in the original and supplemental bills. Upon the trial, the Circuit Court found that the conveyance from John W. Rutt to Jonathan R. Rutt was fraudulent, and decreed that it be set aside and the lot made subject to an execution issuing from the judgment. Jonathan R. Rutt appealed from that decree.

The evidence in this record shows that John W. Rutt, after the execution of the notes which formed the basis of the judgment recovered against him, and his son, Samuel R. Rutt, sold the lot in question to his son, Jonathan R. Rutt, for \$1,600, its full value; that he received therefor \$600 in cash, and a note and mortgage on the lot for \$1,000, and that the note and mortgage have been paid. It also appears that he, at the same time, being a widower, and quite advanced in years, called together his children and in consideration of their verbal agreement to support him so long as he should live, made a distribution of his property among them.

The distribution of his property by John W. Rutt to his children was fraudulent, whether done for the purpose of hindering and delaying creditors or in good faith. A debtor

Herrick v. Lynch.

can not dispose of his property in secret trust for himself so as to defeat existing creditors in the collection of their claims. Although such a transaction may be for a valuable consideration, it is fraudulent as to creditors, because it places beyond their reach a valuable right and gives to the debtor the enjoyment of what rightfully belongs to them. It is wholly immaterial in such a case to show that no actual fraud was intended, for the result would be the same. The Circuit Court could have entered a personal decree against the defendants who had taken under the distribution in proportion to the respective amounts taken by them.

We think the court erred in finding the conveyance of the town lot fraudulent, and in entering decree that it be set aside and made subject to appellee's judgment and execution. The lot was sold in good faith for its full value, and although John W. Rutt may have intended at the time to make the distribution which he did make, and the money realized from the sale may have formed part of the fund distributed, it does not appear that the agreement between the father and children entered into the consideration for the conveyance.

The only fraud with reference to the lot, was the allowance to Jonathan R. of four hundred dollars as payment on the note and mortgage, the same as allowed to the other children, at the distribution. With a proper averment and prayer in the bill, appellee could have the mortgage foreclosed to that extent for his benefit.

The decree will be reversed, and the cause remanded with leave to amend the bill if desired.

Herrick v. Lynch et al.

49	657
150s	283

1. *Fraud—Parties in Pari Delicto—Attorney and Client.*—Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract, which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices.

2. *Fraud—Pari Delicto—The Rule in Equity Not Always Applied.*—L., being indebted to different persons, applied to H. for legal advice, procured from him a small advance of money, and under his advice conveyed to him a large amount of property, ostensibly for the purpose of securing H., but really for the purpose of hindering his creditors. H. having received the return of the amount of money advanced by him out of the rents and profits, a proceeding in chancery was had to compel, among other things, a re-conveyance of the property. *It was held*, that the parties being, one, legal adviser and the other client, and by the advice of the former being adopted, he procured the latter's interest in real property, they were not in *pari delicto*, and that the rule of equity which denies relief to one party against another when both have engaged in a fraudulent transaction should not be applied.

3. *Conflict of Testimony—Master's Report.*—Where there is a conflict of testimony before a master on a reference to state an account, the court will not feel warranted in disturbing the finding upon the ground that it is against the weight of the testimony, as the master who heard the testimony and stated the account saw the witnesses and observed their manner of testifying, and had superior opportunities for judging correctly of their credibility.

4. *Jurisdiction—Right to Question Waived by Answering.*—Where a court of chancery obtains jurisdiction of the parties, and the subject-matter of a controversy involves, incidentally, matters of account between the parties, there is no necessity in litigating the accounts by piecemeal. In such cases a party answering generally, waives his right to question the jurisdiction of the court to state the account.

Memorandum.—Bill for partition and relief. Appeal from the Circuit Court of DeKalb County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

STATEMENT OF THE CASE.

In the year 1888, Thomas Lynch, Sr., died in De Kalb County, seized of two farms, one in De Kalb County, and one in La Salle County, leaving no widow, but seven children, his only heirs at law. His son, Thomas Lynch, Jr., was appointed administrator of his estate, and during his administration invested a part of the funds of the estate in the purchase of lot three in Mallory's addition to Leland in La Salle County, and had a conveyance of the same made

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to himself and his brother, Charles Lynch. Subsequently a conveyance was obtained from George Lynch, one of the children, of his interest in the real estate of his father, to Thomas and Charles Lynch. A reckoning was had between Thomas and Charles and the other children, and \$2,300 was borrowed by Thomas from one Meinke, to make good funds which he had appropriated from the personal assets of the estate, and at the same time Charles borrowed from the same party \$700, the other children becoming security for Thomas and Charles. Thomas secured a deed from Charles of his interest in the town lot in Leland, and he and Charles executed to their brothers and sisters a mortgage on all of their interest in their lands for the purpose of indemnifying them as surety on the indebtedness to Meinke. On the 7th of August, 1890, one Llewellyn obtained judgment against Thomas and Charles for \$200. On the 12th of August, 1890, appellant, George J. Herrick, obtained judgment against Thomas and Charles on a note of \$175, upon which Charles was surety. On August '5, 1890, Charles executed and delivered to his brother, James Lynch, a mortgage for \$2,000 on all his interests in the real estate. On the 17th and 18th days of December, Thomas executed quit claim deeds to Herrick of all his interest in the real estate inherited from his father, and the town lot in Leland. In May, 1891, a bill for partition of the farm lands, and for an accounting between the parties interested therein was filed by all the children, except Thomas, making Thomas and appellant parties defendant. The bill charged default upon the part of Thomas in failing to indemnify the complainants as surety upon the Meinke indebtedness, and asked that the rents and profits of lot three received by Herrick, after his purchase from Thomas, be paid over on such indebtedness, and asking a foreclosure of the mortgage given by Thomas to his brothers and sisters on said town lot three. In June, 1891, an amendment to the bill was filed, setting up the judgment mentioned above, against Charles and Thomas, and the mortgage indebtedness from Charles to James, and alleging that it was about \$1,200. Herrick an-

swered, denying the validity of the mortgage from Charles to James, averring that it was given for no consideration, and for the purpose of defrauding the creditors of Charles.

Thomas failing to answer, a default was entered against him. A decree was entered finding the title in the farm lands as above set forth, finding that Herrick owned an undivided three-fourteenths, subject to the incumbrances, by virtue of his purchase from Thomas, and appointing commissioners to partition the lands. The commissioners reported that the lands were not susceptible of partition and appraised the same at \$13,770. A decree for sale was entered and in October, 1891, the lands were sold under the decree for \$16,210. A few days before the sale Thomas filed an interpleader charging that Herrick held title to his interest in the real estate simply as security for the note upon which judgment was entered against him and Charles; that Herrick had collected rents on the lot amounting to \$137 which should be applied upon the note, and that he had offered to pay Herrick the balance due him and requested a reconveyance, which was refused. The interpleader asks that the master in chancery, out of the proceeds of the sale may pay what balance may be due Herrick, and that Herrick be required to re-convey lot three to him. He subsequently filed an amendment to his bill in which he claims to have paid other moneys to Herrick. The questions of accounting, liens, and the validity of the mortgage from Charles to James having been reserved, the case was referred to the master in chancery to take proofs and make findings as to all the matters pertaining thereto, and the controversy between Herrick and Thomas Lynch, it being agreed that Herrick should be considered as denying all the material allegations in the so-called interpleader.

There was no controversy on the general question of accounting between Thomas Lynch and his brothers and sisters, but the contest was as to the validity of the mortgage from Charles to James, and as to whether the deeds from Thomas to Herrick were given only as security for indebtedness held by Herrick against Thomas and Charles merely,

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or were absolute conveyances, and whether Thomas advanced to Herrick the sums of moneys claimed by his amended interpleader. The master reported adversely to Herrick on all of the controverted questions. Exceptions were filed to his report and upon a hearing the court overruled the same and rendered a decree approving the master's report; finding that the note and mortgage from Charles to James was valid and security for a debt of \$1,270 with interest; finding the deeds from Thomas Lynch to Herrick were given as security only for indebtedness and should be treated as mortgages; that the indebtedness from Thomas Lynch to George J. Herrick had been paid; that Thomas Lynch advanced to George J. Herrick the sum of \$490 over and above the net rents of lot three; that the rents had overpaid Herrick \$150.78, and ordered that Herrick pay to Lynch the \$150.78. From this decree Herrick appealed.

APPELLANT'S BRIEF, CARNES & DUNTON, ATTORNEYS.

It would be mere affectation to cite many authorities to the effect that a court of equity will not aid a fraudulent transaction. A court of equity so abhors a fraud that it will take up the objection of its own motion, if it appears from the bill or the evidence, whether the defendants interpose it or not. Kerr on Fraud and Mistake, 374; Hamilton v. Ball, 2 Ir. Eq., 191.

It does not matter whether creditors are in fact defrauded or if, in fact, there was a mistake as to whether there was a valid debt, or whether the transaction could operate to defraud. If there was the intent to defraud, equity will not interfere. Greenhood Pub. Policy, 167.

Equity will not aid to enforce secret trust by grantor in grantee in fraudulent conveyance. McElroy v. Hiner, 133 Ill. 156.

APPELLEES' BRIEF, JONES & ROGERS AND T. M. CLIFFE
ATTORNEYS FOR THOMAS LYNCH, JR., LUTHER
LOWELL, FOR JAMES LYNCH.

The appellees contended that Herrick was, in fact, Thomas

Lynch's attorney and was acting for him as such. His relations toward him were as an attorney to his client.

Lord Chelmsford in *Tate v. Williamson*, L. R. 2 Chan. App. Cas. 55, lays down the rule as follows: "Whenever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no confidential relation had existed."

It is not the doctrine of courts of equity that attorneys are, by their fiduciary position, wholly incapacitated to purchase from their clients; nor does such incapacity ordinarily exist in case of other fiduciary relations. The rule, however, is that the presumption is always against the validity of transactions of that character, and the burden is on the attorney to remove that presumption, by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, and knowledge, intention and freedom of action on the part of the client, and also that he gave his client full information and disinterested advice. *Roby v. Colehour et al.*, 135 Ill. 341.

The relation of attorney and client being one of special trust and confidence, the law requires that all dealings between them shall be characterized by the utmost fairness and good faith, and it scrutinizes all transactions had between them. So strict is the rule, that dealings between them are held as against the attorney to be *prima facie* fraudulent, and the burden is not upon the client to establish fraud and imposition, but it rests upon the attorney to show fairness, adequacy and equity. *Morrison et al. v. Smith*, 130 Ill. 305.

OPINION OF THE COURT, HARKER, P. J.

The controverted questions in this case are:

First. Whether the quit-claim deeds executed and deliv-

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ered to appellant on the 17th and 18th of December, 1890, were given to secure indebtedness to be treated in equity as mortgages, or were absolute conveyances.

Second. Whether, in the event of that question being decided against appellant, relief should not be denied Thomas Lynch, on the ground that the conveyances were made with the fraudulent purpose of hindering and delaying creditors.

Third. Whether Thomas Lynch advanced to appellant the sums of money claimed by the amended interpleader, as it is called in this case, and allowed by the master in chancery.

Fourth. Whether the alleged advances to appellant could become the subject of adjudication in a court of equity.

Fifth. Whether the mortgage from Charles Lynch to James Lynch was made in good faith and valid.

The evidence in this record shows that Thomas Lynch, through mismanagement in the administration of his father's estate, had become largely indebted to the estate and involved in difficulties with his brothers and sisters. In his embarrassment he applied to appellant, a lawyer without license, for advice and financial aid. Appellant furnished him some money and undertook, through his advice, to lead him out of his difficulties. We entertain but little doubt that while appellant was thus acting as a legal adviser, various schemes by which creditors of Thomas could be defeated of their claims were discussed and considered by the two. We are of the belief that these schemes were suggested by appellant.

We have carefully examined the testimony, and have reached the conclusion that the master's report, and the finding of the court that the deeds from Thomas Lynch to appellant were given as security for indebtedness, and should be treated as mortgages, were correct. It was a large amount of property to secure so small an indebtedness, and one of the purposes may have been to prevent other creditors from reaching it. We do not think, however, that under the

circumstances there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction.

The parties were not *pari delicto*. One was legal adviser, the other client. The advice of the former being adopted, he procured title to the latter's interest in valuable real estate. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract, which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices. 1 Story's Eq. Jur., Sec. 300; Baehr v. Wolf et al., 59 Ill. 474.

We do not feel warranted in disturbing the finding as to the state of accounts between appellant and Thomas Lynch, and the order that appellant should pay Thomas the sum of \$150.78. There was a sharp conflict between the parties on this branch of the case. The master who heard the testimony and stated the account, saw the witnesses and observed their manner of testifying. His opportunities for judging correctly their credibility were superior to ours.

We think the court had jurisdiction to adjudicate upon the matter of advances made by Thomas Lynch to appellant. Having obtained jurisdiction of the parties and the subject-matters, there was no necessity of litigating over these accounts by piecemeal. Having answered to the so-called interpleader and taken issue upon the claim of this indebtedness, he waived all right, if he had any, to the question of jurisdiction.

The views above expressed fully dispose of the contention that the mortgage from Charles Lynch to James Lynch was invalid.

We may say, however, without entering into detail upon the merits of that question, that the evidence satisfies us that the mortgage was made in good faith. Decree affirmed.

INDEX.

ABATEMENT.

Former Suit Pending.—The pending of another suit for the same cause is matter in abatement, to be taken advantage of by plea, and whether in a suit of forcible detainer a formal written plea was necessary or not, it is essential in case the pending of another suit is to be made a defense that it be pleaded in abatement, and unless the matter relied upon appears of record the requirement of the statute must be met by oath or affidavit. *Shepardson v. McDole*, 850

Former Suit Pending—Reasons for the Rule.—The reasons for abating a second suit, is that the defendant may not be vexed with a suit that is useless on account of the pendency of another suit in which the plaintiff may have the same remedy. But, in order to have the effect to abate the second suit, the remedy, furnished by the first action, must be complete for the same thing for which the second was brought. *Shepardson v. McDole*, 850

What is a Former Suit Pending.—The pending of a suit in chancery by a person in possession of land asking for a specific performance of an alleged verbal agreement between him and his deceased father, is not such a suit as can be pleaded in abatement, in an action of forcible detainer brought against him by the executor of the father's last will and testament. *Shepardson v. McDole*, 850

ACCOUNTING.

Claim for Board, Clothing and Medical Attendance.—In a suit for foreclosure and a cross-bill by defendants for an accounting of certain expenses, among which was a claim for furnishing necessary board, clothing and medical attendance, it appeared that it was not the intention of the party to charge for such furnishing at the time, and the claim was not allowed. *Mann v. Mann*, 472

Claim for Taxes and Insurance.—In an accounting upon a cross-bill in a foreclosure proceeding, it is error to allow an abatement of the amount due on the mortgage by reason of expenses incurred for taxes and insurance, where it was the duty of the party claiming such abatement to pay the taxes, and where he had a right to keep the property insured for his own benefit. *Mann v. Mann*, 472

ACCOUNTS SUED ON.

Copies—Objections for Not Filing—When Too Late.—Where a plaintiff fails to file a statement of the account sued on, the defendant may have the case continued for the term, or he may obtain a

ACCOUNTS SUED ON. *Continued.*

rule upon the plaintiff to file such statement. If he does not elect to do so, however, and pleads in bar, he can not raise the objection on the trial. *Dunker v. Schlotfeldt*, 652

ADVANCEMENTS.

A person, after making his will, by which he bequeathed to a daughter the sum of three thousand dollars, made an arrangement by which he advanced to her the amount, and took from her the following note:

"\$3,000.

CHESTERFIELD, ILL., Feb. 1, 1875.

_____after date I promise to pay to the order of A. W. Loper, note to run during my natural life, three thousand dollars, value received, with eight per cent per annum from date.

LODUSKY HAYWARD."

At the death of the testator it was insisted on behalf of the maker, that the note was not payable until her death, and that she was entitled to her legacy in money. *It was held*, that the word *my*, should be read *his*, and that the note was payable at the death of the payee, who was the testator. *Hayward v. Loper*, 53

AFFIRMANCE.

Under the Rule in the Rapp Case.—Unless it appears from the record that the obligor has been released from his entire liability upon the bond under the rule of law laid down in the case of the estate of Michael Rapp v. The Phoenix Insurance Co., 113 Ill. 390, the judgment will not be affirmed. *Donnell Mfg. Co. v. Jones*, 327

AGENCY.

If a person holds himself out to be acting as the agent and for the benefit of and for the signers of a syndicate, the law will not permit him to repudiate his agency and speculate out of the partners of such signers in a matter in which they all have a common interest. *Lyon v. Worcester*, 639

Evidence of—Statements of the Agent.—The declarations of an agent are not of themselves evidence of the fact of his agency. *Webber v. Indiana Nat. Bk.*, 336

AGENTS.

Exclusive Credit.—A person dealing with an agent known to be such, may give him the exclusive credit, and in such case, the creditor can not afterward elect to hold the principal. *McFadden v. Lynn*, 166

Liability of Third Persons Dealing with Agents.—If a creditor voluntarily gives an enlarged credit to the agent of the debtor, or adopt a particular mode of payment whereby the principal is placed in a worse position than he otherwise would have been, the liability of the original debtor is discharged. *McFadden v. Lynn*, 166

Right of an Agent to Speculate out of his Principal.—An agent has no right to speculate out of his principal, and where he purchased a piece of property for his principal, even if authorized to pay a certain price, he has no right to purchase it at a less price and

AGENTS. *Continued.*

claim the difference as his own. The principal has a right under such circumstances to the benefit of the more favorable price for which the property is bought. *Lyon v. Worcester*, 629

When Bound by the Fraudulent Acts of an Agent.—A principal holding out an agent as having authority to represent him, and thereby asserting or impliedly admitting that the agent is worthy of trust and confidence, is bound by all his acts within the apparent scope of the employment. Hence, the principal may be held for the fraudulent acts of the agent. *McFadden v. Lynn*, 166

ALIMONY.

Contempt of Court—Failure to Pay.—A decree for alimony may be made, by express terms, a lien upon real estate, as well as by virtue of the statute, but this will not deprive the court of the power to enforce payment by attachment for contempt of court. Such power will not be exercised, however, when the failure to pay is through mere inability and is not willful. *McSherry v. McSherry*, 90

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Franchise Involved.—A bill in chancery praying that, in case the defendant, a railroad company, had conveyed its property to a consolidated company, which was shown to be the case, then, that such deed, on the hearing, be set aside, involves a franchise and therefore no appeal lies to this court. *City of Belleville v. I. & St. L. R. R. Co.*, 801

APPEALS.

Practice—Abstract of Instructions.—The Appellate Court may properly refuse to consider an assigned error in giving an instruction, where the instructions for the adverse party are not abstracted, the question not being properly raised, as the supposed error might have been cured by other instructions. *Lindgren v. Swartz*, 488

Court Can Look Only to the Bill of Exceptions.—In an action upon a promissory note, where the judgment is appealed from, and the bill of exceptions does not contain a copy of the note introduced upon the trial, *it was held*, that this deficiency in the bill of exceptions can not be supplied by the declaration or the copy of the note attached thereto; the court can look to the bill of exceptions, and to that only, for the evidence. *Spain et al. v. Thomas*. 249

APPEARANCE.

Special Entry of.—Where the object of entering an appearance is to question the jurisdiction of the court, it is not necessary that the person entering such appearance should submit himself to the jurisdiction, surrender his right in that respect and confer jurisdiction where none existed. *Graves v. Whitney*, 435

APPELLATE COURTS.

A Rule of Practice.—The rule that parties can not make a new case in the Appellate Court applies to the law as well as to the facts,

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so an objection not made in the trial court can not be considered.
O'Connor v. Village of Shabbona, 619

Practice in Reviewing Cases.—The Appellate Courts exercise appellate jurisdiction only, and this consists in reviewing cases as they appear in the trial court, and not in trying them *de novo*. If the parties are allowed to stipulate as to facts not appearing to the trial court, it would make the hearing in the Appellate Court a trial *de novo*, instead of a review of what was acted upon in the trial court. *O'Connor v. Village of Shabbona,* 619

Practice in Hearing Cases.—In a suit for the violation of an ordinance brought to the Appellate Court by appeal, a stipulation was filed by the party that a certain paper offered was the “original ordinance passed by the board of trustees.” Under this stipulation the paper was presented to the Appellate Court for consideration. *It was held,* that every fact which could rightly influence the action of the trial court must be brought to its attention, if it is to have any weight in reviewing cases brought from the trial court to the Appellate Court. The stipulation was not noticed. *O'Connor v. The Village of Shabbona,* 619

ASSAULT AND BATTERY.

Evidence of Antecedent Facts.—In the trial of an action for an assault and battery, an inquiry into antecedent facts is not proper, unless they are fairly to be considered as part of the same transaction. So *held,* where a party was allowed to prove the conduct and deportment of his adversary on previous occasions. *Hulse v. Tollman,* 490

ASSESSMENT.

Necessity of Payment—Accumulations.—Where a certificate in a mutual benefit association required the holder to pay a mortuary assessment on the death of each member, and such further assessments as might be made by the directors or managers for expenses and collection costs, within thirty days after notice, and if not received within such time by the company, the certificate was to be null and void, it appeared that the holder of the certificate had paid all assessments, which appeared to have been excessive, resulting in a surplus. *It was held,* that if in making assessments for mortuary purposes, more was required and collected than was authorized by the contract, the excess would stand to the credit of the holder of the certificate. Under such circumstances he might well decline to pay assessments, until the amount thus to his credit was equaled by unpaid assessments. *Covenant Mutual Benefit Assn. v. Baldwin,* 203

ASSIGNEE.

When his Authority Begins.—The person named in a deed of assignment is the legal assignee from the time he receives the assignment and commences to act under it, and is fully qualified to act as such from that time, and if he is endeavoring to get possession of the assigned property, it will be illegal for the holder of the chattel mortgage to seize it and thereby deprive the assignee of the custody of

ASSIGNEE. Continued.

it, as it would be illegal to deprive the County Court of the jurisdiction, and in such cases the County Court would have power to order it returned to the assignee, he being the agent of the court. *Mann v. Reed*, 406

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Acknowledgment and Record.—An assignment for the benefit of creditors is valid without being acknowledged or recorded, or without the assignee giving a bond. There are no negative words in the statute, and as the acknowledging and recording are not an essence of the thing done, and the substantial purposes of the act may be accomplished without either, these provisions of the law are directory only, and the assignee may act without giving bond as a *de facto* assignee. *Mann v. Reed*, 406

Improper Preferences.—If a creditor has sought to obtain an improper preference, it will be the duty of the court to disallow it, and put his claim upon an equal footing with other creditors. It is the duty of the sheriff to aid the court in this particular, and not to endeavor to obtain improper preferences over judgment creditors who have caused executions to be placed in his hands. *Mann v. Reed*, 406

Office of Recording, etc.—While the statute requires an assignment for the benefit of creditors to be recorded, the only office of the record is constructive notice of its having been made, and when there is actual notice of the assignment the same rule as to taking possession by the assignee of the assigned property prevails in the one case as in the other. *Mann v. Reed*, 406

Policy of the Law.—It is the policy of the statute to expose and correct frauds, for the benefit of creditors, and compel equal distribution of the proceeds of the assets, under the assignment, rather than to declare the assignment void. Hence the statute provides that all provisions in the deed of assignment preferring creditors shall be void. *Mann v. Reed*, 406

Property Subject to Liens, etc.—A brewing company entered into a contract with the Hercules Iron Works, to put into its establishment a refrigerating plant, for \$10,500, to be paid for as follows: one-fourth cash on delivery of the machinery; one-fourth on the complete erection of the plant; \$2,750, by a note payable in four months, the balance in first mortgage bonds due in ten years. The iron works put in the plant, received the first cash payment. The second was not made in cash, but instead thereof a note due in ninety days was taken. Afterward a note for the third payment was taken. Neither of these notes was paid. The contract contained a clause, that the iron works should have a right to remove the plant in case of default in any of the payments. Afterward the brewing company made an assignment for the benefit of its creditors; the iron works filed a petition in the County Court, claiming the right to remove the plant, according to the terms of the contract; the court dismissed the petition and the iron works appealed. *It*

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. *Continued.*

was held, that as between the parties to it, the contract was valid, there being no judgment or attaching creditors, or *bona fide* purchasers without notice, and that the assignee occupied no different position from the brewing company, the assignor. *Hercules Iron Works v. Hummer*, 598

What the Assignee Takes.—Under a general assignment, the assignee takes as a mere volunteer, and the property assigned is subject to the same defects of title, equities and liens as when in the hands of the assignor. *Hercules Iron Works v. Hummer*, 598

ATTACHMENTS.

Against Partnership.—Attachment proceeding will not be sustained against a partnership as an entity, unless the grounds for attachment existed against all the partners, and this rule is said to be universal, whether in a jurisdiction where by special statute, judgments against a partnership may be rendered, though not all the partners are served with process, or where the common law rule that the judgment is against the members of the partnership, prevails. *Hinman v. Andrews Opera Co.*, 135

Against Partnership.—Sec. 3, Ch. 11, R. S., authorizing attachment proceedings against a partnership by its firm name, is not intended to abolish the common law rule relating to the service of process in suits against partnerships. *Hinman v. Andrews Opera Co.*, 135

Affidavit—The Rule under the Statute.—Under our statute an attachment against a partnership by the firm name as an entity, can only be sustained when the affidavit discloses grounds of attachment against each of the partners, and all must be brought within the jurisdiction of the court. *Hinman v. Andrews Opera Co.*, 135

ATTORNEY FEES.

Demand for Amount Due.—Under the provision of the “act providing for attorney’s fees when a mechanic, laborer or servant sues for wages” (Laws, 1889, 372, Hurd’s Statutes, 1891, 185), if the amount recovered is less than the amount named in the demand in writing, required by the act, no attorney fees can be allowed. *Fletcher v. Massey*, 36

Under Statutes.—In a suit for wages the court gave the following instruction: If the jury find for the plaintiff, the form of the verdict will be, “We, the jury, find for the plaintiff and fix her damages at \$ for wages, and \$ for attorney’s fees,” which was all the instruction given in the case (except one as to the form of a verdict) for the defendant, under the statute providing that whenever a servant or employe shall have cause to bring a suit for wages earned and due and owing according to the terms of the employment, and shall establish by the decision of the court or jury that the amount for which the suit is brought, is justly due and owing, and a demand therefor has been made in writing, etc., then it shall be the duty of the court to allow a reasonable attorney fee. It is for the court and not the jury to fix the amount to be allowed as the attorney fee, and the instruction was held erroneous. *Fletcher v. Massey*, 36

BETTERMENTS.

Made by Mortgagor.—In an action to foreclose a mortgage, the defendant filed a cross-bill asking an accounting for betterments made by him upon the land; the claim was not allowed as the mortgage attached to all betterments as soon as made. *Mann v. Mann*, 472

BILL OF EXCEPTIONS.

Its Office.—In case there is no bill of exceptions the Appellate Court can not inquire as to the evidence, or the ruling in refusing a motion for a new trial. *Helmuth v. Bell*, 826

A Pleading.—A bill of exceptions is the pleading of the party alleging the exception, and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be construed most strongly against the party preparing it. *E. St. L. Electric St. R. R. Co. v. Cauley*, 810

Certificate of Evidence.—A bill of exceptions, with only the certificate of the reporter, stating that it contained all the oral evidence, but lacking entirely the certificate of the judge, that it contained all the evidence in the case, is not such a bill of exceptions as the law requires. *Lindgren v. Swartz*, 488

To Contain Rulings, etc.—The rulings of the trial court in giving or refusing instructions can not be reviewed in the Appellate Court unless the instructions, together with the rulings and proper exceptions, are preserved in a bill of exceptions. *Burlison v. Roberts*, 269

Exceptions to a Motion for a New Trial.—A motion for a new trial and the exception to the action of the court in overruling the same must be made to appear by the bill of exceptions. A statement thereof by the clerk in the judgment order is utterly valueless. So, no exception to the action of the court in overruling a motion for a new trial is shown by the following statement in the bill of exceptions: "But the court overruled the motion (for a new trial) and rendered a judgment in accordance with the finding of the jury, to the rendition of which judgment the defendant then and there excepted." *E. St. L. Electric St. R. R. Co. v. Cauley*, 810

Inference from its Absence.—In the absence of a bill of exceptions everything depending upon the evidence is inferred in favor of the verdict. *Helmuth v. Bell*, 826

Reporter's Certificate.—The certificate of the reporter can not be substituted for that of the judge to a bill of exceptions. *Lindgren v. Swartz*, 488

Statement that it Contains all the Evidence, etc.—Questions of Fact.—Where, in an action upon a promissory note, the bill of exceptions contained the following statement, viz., "The foregoing was all the evidence introduced, except the note which was in evidence on the trial of the cause," it was held to be insufficient, as it showed upon its face that it did not contain material evidence which was introduced upon the trial. *Spain v. Thomas*, 249

BILL OF LADING.

Carrier Bound by its Statements, etc.—Where a person advances money on the faith of a bill of lading as between him and the car-

BILL OF LADING. *Continued.*

rier issuing it, the carrier is bound by the terms of the bill and he can not be permitted to escape his liability by showing that the statements contained in it are false. *Tibbits v. R. I. & P. Ry. Co.*, 567

"Contents and Value Unknown."—Where a bill of lading of a carload of corn, made by filling up a general blank form for shipping all sorts of freight, contained in a parenthesis the words "contents and value unknown" evidently intended to apply to packages therein mentioned, the contents of which are concealed from view, *it was held*, that such a condition in a bill of lading does not apply to corn in bulk loaded into a car from an elevator. *Tibbits v. R. I. & P. Ry. Co.*, 567

Use of, to Obtain Advances on Shipments.—Bills of lading are constantly used by shippers to obtain advances upon their shipments. It is to be expected by the carrier that such use will be made of them; that advances will be made upon the faith that the property described in them is in the possession of the carrier, and will be delivered to the holder of the bills of lading. Persons trusting in them and relying upon their truth do only what the carrier has every reason to expect will be done. Such use is a material aid to traffic and business, and is to be recognized as an important and useful factor in the business of the country. *Tibbits & Son v. Rock Island & Peoria Ry. Co.*, 567

Weight Stated Subject to Correction.—A bill of lading contained a statement that the weight, referring to the articles shipped, was subject to correction. *It was held*, that, so far as the statement was concerned, a reasonable construction must be given to it, such as the parties would naturally give when the shipment was made. Errors and mistakes are liable to occur in weighing merchandise, and the right reserved in the bill to correct such errors applied to such ordinary errors and differences in weighing as might be reasonably expected to occur and not to such errors as would be apparent to the sight. *Tibbits v. R. I. & P. Ry. Co.*, 567

BONDS.

Material Alterations—Duty of the Court to Instruct as to the Law.—A person employed in the service of another, being required to give a bond for the faithful performance of certain services, wrote the bond himself, from a form furnished him by his employer, and took it away with him for the purpose of having it signed and acknowledged by his sureties, one of whom did not read the bond, or require it to be read, but inquired what it was intended to secure, and signed it after having been informed that it was only for the purpose of securing the return of a wagon, and implements which were furnished him by his employer for use in his business. Afterward said person delivered the bond to his employer. When delivered, the condition of the bond was, that he should take good care of the implements, wagon and other property furnished him, deliver up the same in good condition when called upon to do so, and promptly report, deliver and pay over to the obligee, all money, goods and

BONDS. Continued.

other property received by him. Default having been made, an action was brought against the obligors. The defense was a denial of liability, on the ground of material alterations in the bond. On one hand the evidence tended to show that the penalty, both in words and figures, and perhaps the names of the sureties, were inserted in the bond after it was signed, and before delivery to the obligors. On the other hand, there was evidence tending to show that if the bond was altered after it was signed, it was while it was in the hands of the person so employed, and before the delivery to his employer, and without the latter's fault or knowledge. *It was held*, in this state of the evidence, to be the duty of the court to instruct the jury upon the law, as to what was, and what was not, a material alteration sufficient to avoid the bond, and leave the jury to determine the facts from the evidence. *Donnell Mfg. Co. v. Jones*, 327

Signed in Blank—Authority of Principal Obligee.—If the surety upon an official bond, relying upon the good faith of his principal, permits him to have possession of the bond signed in blank, such an act will clothe the principal with authority to fill up the blanks in any appropriate manner consistent with the nature of the obligation, so that, as against the obligee, receiving the bond without notice or negligence, and in good faith, the surety will be estopped to allege that he executed the instrument with a reservation, or upon condition, with reference to filling the blanks, and this, whether the blanks to be filled relate to the penalty, or the names of co-sureties. The liability of the surety in these cases is put upon the ground that he makes the principal maker his agent to deliver the bond, and clothes him with apparent authority to fill up the bond, and to do any other acts which are necessary to make the instrument effectual for the purposes intended. *Donnell Mfg. Co. v. Jones*, 327

The Rule Applies to Private as Well as Official Bonds.—A bond without a penalty is valueless; therefore where a surety signs a bond in this condition, he authorizes the principal intrusted with the delivery of it to insert the penalty in the appropriate blank, and if the obligee takes the bond without notice or negligence, the surety is bound. The reason of this rule applies as well to private as to official bonds. *Donnell Mfg. Co. v. Jones*, 327

BURDEN OF PROOF.

Self-Defense.—In an action of trespass, where it was stipulated that all pleas were in, the defendant undertook to establish a plea of self-defense. *It was held*, that by this plea the assault was admitted, and the burden of proving that it was committed in self-defense, was on the defendant. *Hulse v. Tollman*, 490

CARE AND NEGLIGENCE.

Relative Terms.—Care and negligence are relative terms, depending largely upon known conditions; as, to run a train at a high rate of speed where it is known that persons are in the habit of passing along the track, or crossing it, although without legal right,

CARE AND NEGLIGENCE. *Continued.*

may be wanton, for which wantonness, resulting in an injury, there could be a recovery, while, if run at the same rate of speed, without such conditions being known, and an injury occurred, there would be no liability. *I. C. R. R. Co. v. Beard*, 232

CHARACTER.

In Action for Slander.—Where a plaintiff's character is attacked by evidence under a plea of justification, showing that the plaintiff has committed a crime, and casting upon him an imputation of dishonesty, it is competent for him to show, if he can, that he has sustained a good character for honesty in the community where he has lived. *Balcom v. Michels*, 379

CHATTEL MORTGAGES.

A chattel mortgage which covers a stock of merchandise which is to be sold and disposed of in the ordinary course of trade, is fraudulent and void as against other creditors of the mortgagors. *Mann v. Reed*, 406

Power of Sheriff Under.—It is no part of the sheriff's duty to foreclose a chattel mortgage, and if he does foreclose one he occupies the position of the private agent of the holders of the mortgage. *Mann v. Reed*, 406

CITIES AND VILLAGES.

Arrest of Offenders.—The arrest of a person on a charge of violation of an ordinance of a municipal corporation, and detaining him in the calaboose, is an act which such corporation is incapable of doing, except through its constituted officer—the city marshal—or some other person duly qualified by law to act. The municipal corporation can act in no other way except through its officers. *Blake v. City of Pontiac*, 541

Building of the City Prison.—The building of the city prison is a lawful act, and its construction does not render the municipality liable for the wrongful imprisonment of persons therein, when they have done no act contributing to it. *Blake v. City of Pontiac*, 544

Calaboose Regulations.—The building of the calaboose, and the establishing of regulations for the detention of prisoners therein to answer to charges of violating the ordinances of the city, are clearly within the police power of municipal corporations, and are not in their nature corporate acts. *Blake v. City of Pontiac*, 544

Care and Negligence.—A city which leaves obstructions in its sidewalks for months, to the peril, in dark nights, of those who do not know of them, can not with grace insist that those who do, shall on every occasion, when about to pass them, dismiss from their minds all interesting subjects of thought and hunt for hidden points of danger. *Town of Normal v. Gresham*, 196

Construction of Ordinances.—The ordinance of a city being in writing, the effect of the same is a matter of construction for the court, and not to be construed by the jury; so where an ordinance fixing the fire limit in a city provided that in case of the erection of a building contrary to its provisions it should be the duty of the

CITIES AND VILLAGES. *Continued.*

mayor, after having given the owner thereof three days' notice to remove the same by the order in writing, to require the city marshal to remove such building, *it was held*, that it was for the court to determine whether a written order to the marshal was necessary, and not to leave that as a question of fact for the jury. *Thompson v. Evans*, 289

Control of Streets.—Under our statute cities are given exclusive control of all streets and alleys within the corporate limits. The fee of the streets is in the corporation, and the dominion over them is as absolute as that of the owner of his lands. *Barrows v. City of Sycamore*, 590

Damages in Grading Streets—Evidence of Proposed Improvements.—In an action against a municipal corporation for damages occasioned by cutting down the grade of a street, the court excluded evidence, offered on the part of the defendant, of the building of an abutment at the intersection of the streets with steps for foot passengers, etc., and the proposed erection of a bridge over the street cut down. This evidence consisted of proceedings of the city council in directing advertisements for bids, advertisements in pursuance of such directions and contract entered into, and the testimony of the city engineer, concerning plans made by him. It did not appear that there was any fixed and definite plan to be preserved and incorporated in the record so as to bind the city to carry it out. There was no ordinance or other record by which the city had determined upon any plan, but the attempt was merely to prove what the council had done in the way of advertising for bids and letting contracts. *It was held*, that the evidence was properly excluded. *City of Joliet v. Emma Blower et al.*, 464

Damnum Absque Injuria.—Where a city erected a water tower in a street, which the plaintiff alleged to be unsightly and cast a shadow upon her premises, *it was held*, that the mere fact that her property had depreciated in value by reason of the proximity of the water tower was not ground for action, as the damages arising from the causes alleged are *damnum absque injuria*. *Barrows v. City of Sycamore*, 590

Defective Sidewalks—Notice to Policemen.—If the policemen of a city are charged with the duty of reporting defects in sidewalks, or if they have been in the habit of doing so by the direction, or with the knowledge and approval, of the officers having general charge of the affairs of the city, then a notice of such a defect to one of their number should be notice to the city. *Looney v. The City of Joliet*, 621

Duty in Regard to Calaboose.—The statute neither requires nor allows a city or other municipal corporation to erect and maintain, as a city prison, an illegal structure, nor does it allow it to incarcerate prisoners therein; therefore such an illegal incarceration should not be regarded as an act of the municipality, as it has no power to do a wrong. *Blake v. City of Pontiac*, 544

CITIES AND VILLAGES. *Continued.*

Enforcement of Ordinances.—The making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, is within the power of a municipal corporation, and all persons officially charged with the execution and enforcement of such ordinances and regulations are *quo ad hoc* police officers. *Blake v. City of Pontiac*, 544

Fire Ordinances—Notices in Writing, etc.—Under an ordinance establishing fire limits, and providing that wooden buildings, which might be erected, removed or repaired, contrary to the provisions of the ordinance, should be deemed nuisances, and upon information thereof it should be the duty of the mayor, after having given the owner or builder thereof three days' notice to remove them by an order in writing, to require the city marshal to raze such buildings to the ground, it is not necessary to give the order in writing to the marshal. The written notice provided for in the ordinance, as an order in writing, is a notice from the mayor to the owner or builder of the building to remove the same, etc., but so far as regards the liability of the mayor and attorney for the acts done by the marshal, it would make no difference whether the notice was in writing or not. *Thompson et al. v. Evans et al.*, 289

Liability for an Act of Its Officers.—In an action brought against a city and the city marshal for arresting a person and confining him in a calaboose, where a city is simply exercising its police powers, any act of its officers or agents, including the directors or aldermen, in violation of and against the terms and spirit of the law, where acting as a legislative body or as mere agents and officers executing the ordinances, are *ultra vires* and in excess of the power of the city, and for such acts of such officers whereby damages accrue to any citizen there is no remedy against the corporation. *Blake v. City of Pontiac*, 544

Liability for Lack of Accommodations, etc., in City Prison.—The fact that tramps and vagrants were kept in the calaboose in company with the plaintiff, and that he was not kept in more select society while confined therein, for the violation of an ordinance, and the further fact that he was offended by their rough and vile conversations, and became nauseated and sick, can not be charged against the city as an original complaint in constructing a prison. *Blake v. City of Pontiac*, 544

Liability for Unauthorized Acts of Officers.—The fact that the officers of a municipal corporation adopt ordinances and appoint a marshal to see that they are executed, does not render the municipal corporation liable for the unauthorized illegal and oppressive acts of the marshal as representative of the municipality. The officers of the municipality only empower the marshal to do that which the ordinances require and not to oppress its citizens. *Blake v. City of Pontiac*, 544

Peddler's License—Ordinances.—An ordinance may be partly good

CITIES AND VILLAGES. *Continued.*

and partly bad, when the parts are, in themselves, entire and distinct from each other. The difficulty is in determining whether the good and bad parts are capable of being separated. *Lucas v. City of Macomb*, 60

Power to Commit Wrongs.—A city, in the performance of its police regulations, can not commit a wrong through its officers in such a way as to render it liable for the torts of its officers. *Blake v. City of Pontiac*, 544

Purchase of Property on Streets.—A purchaser of property on a street in a city can not be held to anticipate that the city will probably destroy the value of such property in a large measure by cutting down streets to accommodate people living on other streets, or that having cut down part of the street, and make an ample roadway for such people, it would then excavate the remainder of the street and cut off access to the property entirely. *City of Joliet v. Emma Blower*, 464

Power over Officers—Ratification.—A city has no power to authorize a police officer to commit an unlawful act, and what it can not do directly it can not do indirectly by ratification. *Blake v. City of Pontiac*, 544

Record of Passage of Ordinance.—The record of the proceedings of a village board, which recited that all the members were present and that the ordinance in question was passed unanimously, shows that the ordinance was legally passed. *Village of Gilberts v. Rabe*, 418

Ordinances Regulating Speed of Trains—Construction.—An ordinance regulating the speed of railroad trains within the limits of the city is sufficiently comprehensive to include an engine without cars attached, as the principal purpose of the ordinance is to prevent railway accidents by running at too high a rate of speed. *E. St. L. Con. Ry. Co. v. O'Hara*, 282

Right to Amend Records of Proceedings.—A village board has the right to amend the record of its proceedings at a subsequent meeting so as to correspond to the facts and make truth appear by supplying omitted facts. So held, where a village board amended the record of its proceedings at a previous meeting, so as to show the legal passage of an ordinance. *Village of Gilberts v. Rabe*, 418

Standard of Diligence in Regard to Defects in Sidewalks.—The standard of diligence and care to be expected of a city or village in the inspection of its sidewalks, is not the same as that to be expected from a casual passer-by. Persons passing over walks with the duty of observing ordinary care for their own safety are held to have exercised such care, although not perceiving such defect, while a city or village is considered negligent in not discovering it. *Looney v. City of Joliet*, 621

COMMERCIAL PAPER.

Purchaser Before Maturity—Notice.—A speculative issue which is necessarily involved as to the diligence or negligence of an as-

COMMERCIAL PAPER. *Continued.*

signee, before maturity, of commercial paper, in following up or failing to follow up inferences suggested by evidentiary facts, will not be permitted. *Webber v. Indiana Nat. Bk.*, 336

Purchaser with Notice.—A purchaser, before maturity, of commercial paper, who takes the same with a full knowledge of defenses, stands in no better situation than the person to whom such paper was originally made payable. *Webber v. Indiana Nat. Bk.*, 336

Rights of an Assignee.—The duty of active inquiry does not rest on the purchaser of commercial paper, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. *Webber v. Indiana Nat. Bk.*, 336

Rights of an Assignee—The General Doctrine.—It is clear from the authorities, that the general doctrine of the law applicable to the purchaser of commercial paper, which is, that notice of facts which should excite inquiry in the minds of a reasonably prudent person, is notice of the ultimate fact which such inquiry would have disclosed, is not applicable to the assignment, before maturity, of such commercial paper as notes. They enter so largely, as a convenient medium, like money, into exchange or trade, stimulating business activity and sustaining, to a great extent, the commercial prosperity of a country, that public policy requires they shall be given almost the freedom of money in passing from hand to hand. Therefore notice of the ultimate act (and not merely notice of evidentiary facts, which should excite inquiry and which if pursued, would, by the exercise of diligence, lead to a knowledge of the ultimate fact), is essential to be established, to impair the title of an assignee of a note, before maturity. *Webber v. Indiana Nat. Bk.*, 336

COMMON CARRIERS.

Bound by Statement of Quantity in Bills of Lading.—T. H. & Co., of Peoria, delivered to the R. I. & P. Ry. Co. a quantity of corn for shipment. It was loaded into a car from an elevator; weighed by the weighmaster of the Board of Trade; properly sealed and shipped to its destination. T. H. & Co. procured from the railroad company a blank bill of lading which they filled up by inserting the weight as given by the weighmaster, and the company's agent signed it. They then forwarded the bill of lading to T. & S. at the point of destination and drew upon them for the price of the corn, according to the weight as stated. The car arrived at its destination in good order, none of the corn having been lost on the way. T. & S. paid the draft and the freight according to the weight stated, but upon opening the car a shortage of 14,336 pounds was found in the corn and for this they brought suit against the railroad company. The bill of lading contained a column at the top of which was the word "Weight," under which were the words "subject to correction." In this column the weight of the corn was set down. The bill also contained the words "contents and value unknown;" under these

COMMON CARRIERS. *Continued.*

conditions the company sought to defeat the suit but it was held that the plaintiff had a right to recover. *Tibbits v. R. I. & P. Ry. Co.*, 567

Neglect of Duty—Damages.—The owner of a lot of cattle, in good condition, desiring to ship them over the plaintiff's road to Chicago, in time for the next day's market, delivered them at the station on its road and they were loaded into cars furnished for that purpose in ample time, if shipped in the usual course of its business, to reach Chicago and be put upon the next day's (Friday's) market. The train, in which the car containing the cattle was to be put, reached the station several hours late and by some neglect, not explained, failed to take the car. Some hours later another train passed without taking it. It then being too late to get the cattle upon the Friday's market, they were unloaded and taken home. The next day the market was lower; a few days later, when the cattle were shipped to Chicago, the market was still lower. In an action brought to recover damages, the jury awarded the plaintiff \$134. *It was held*, not to be excessive, considering the fall of the market, the state of the weather, and the evidence tending to show that in driving the cattle back and forth and keeping them until they were finally shipped, they shrunk from sixty to seventy pounds, and were also fed ten or eleven bushels of corn a day, worth thirty-five cents a bushel. *Illinois Central Railroad Company v. Simmons*, 443

COMPARATIVE NEGLIGENCE.

Application.—The law of comparative negligence has no application unless the person injured was, at the time, in the exercise of ordinary care. Where the person voluntarily and unnecessarily placed himself in a position well known to be a place of danger and is injured, there can be no recovery for even gross negligence on the part of the defendant, his act not being willful or wanton. *I. C. R. R. Co. v. Beard*, 232

CONDONATION.

Revival of Former Course of Action.—Evidence of an unjustifiable act of cruelty in 1874, followed by cohabitation for six months, and another act of cruelty, under considerable provocation, followed by peaceful cohabitation till 1882, when defendant threatened to shoot complainant if she disobeyed his request not to go to a dance, which she did, and left him for six months, returning to him and abiding with him till 1886. In 1886, he accused her of adultery, after which she lived with him for months before leaving him. *It was held*, that such action was insufficient to support a decree of divorce for cruelty, and should be such condonation as to bar a suit. *It was held, also*, that the latter accusation did not renew the former acts of cruelty. *Nullmeyer v. Nullmeyer*, 573

CONFESSION OF JUDGMENT.

Entered Nunc Pro Tunc.—A clerk of a court in this State is not authorized to enter a judgment by confession in vacation as of some previous term; he can only enter judgment in vacation as such, and

CONFESSION OF JUDGMENT. *Continued.*

can not enter it as of some term, or *nunc pro tunc*. *Graves v. Whitney*, 435

CONFLICT OF TESTIMONY.

Master's Report.—Where there is a conflict of testimony before a master on a reference to state an account, the court will not feel warranted in disturbing the finding upon the ground that it is against the weight of the testimony, as the master who heard the testimony and stated the account saw the witnesses and observed their manner of testifying, and had superior opportunities for judging correctly of their credibility. *Herrick v. Lynch*, 657

CONSPIRACY.

Statement of the facts constituting the offense, is contained in the opinion of the court. *Medley v. The People*, 218

Failure to Accomplish the Common Purpose.—Where an indictment for a conspiracy sufficiently charges the offense, and it sufficiently appears from the evidence that the defendants were acting in concert, the fact that they did not succeed in accomplishing their purpose, does not affect the question. Conspiracy to do a thing, and an effort made to carry out a common purpose, may be sufficient to constitute the charge of conspiracy, it not being necessary for the conspirators to succeed in their design. *Medley v. The People*, 218

CONTRACTS.

Construction of.—It appeared that the appellants made a verbal contract to bore a well upon appellee's land that would permanently furnish sufficient water for the wants of thirty to forty head of stock, and that sixty days should be allowed in which to test its capacity and permanency of the supply of water. Appellee put a pump in the well which lacked thirty-five feet of reaching the bottom. *It was held*, that by no fair construction of the contract could it be held that the appellants were required to furnish the necessary supply of water within the reach of such a pump. The capacity of the well, or the strength of the vein, could not be fairly tested in that way. *Waggoner et al. v. Stocks*, 151

Of Hiring—Rule in Case of a Breach.—The rule in a suit for a breach of contract for hiring as to the amount of recovery, is the wages agreed to be paid by the contract, and the burden of showing what the plaintiff did earn or could have earned by reasonable diligence in other employment in case of his discharge before the expiration of the time fixed by the contract, is upon the defendant. *Kelley v. L. & N. R. R. Co.*, 304

Of Subscription.—Upon the execution of a contract of subscription for stock, mutual rights arise between the subscribers in their relation to each other, by reason of which they are to reap the benefits, or share the burdens of the enterprise. *Great Western Telegraph Co. v. Haight*, 633

Sale of Real Estate by Agent.—Appellee approached appellant with a view of inducing him to list his real estate with his agency for sale. He was told that the farm was not for sale, in the sense

CONTRACTS. Continued.

that he was hunting a buyer, but like other people, he had a price, and that if any one came along and offered him that price he would sell it. That he had held his farm at thirty dollars an acre. Appellee said in reply, "Will you place your farm in my hands to sell?" to which he replied, "No, sir! I am capable of transacting my own business, and so long as that condition continues, I do not want to employ any man to transact it for me. It is my farm, and I propose whatever there is in it, to make, and if you make anything out of the sale of my farm, you must make it out of the other fellow." Appellee afterward advertised the farm in a paper owned by him, and by personal solicitations, endeavored to effect a sale, etc.; took a man into his office, talked the matter over, told him it was a bargain, etc. The man went to appellant and bought the farm at \$31 per acre; upon the trial the jury found for appellee, for the amount. *Held*, that the evidence was sufficient to support the verdict. *Ellis v. Dunsworth, Adm'x*, 187

Silence Warrants the Conclusion of an Acceptance.—A heating furnace was put into a dwelling house, with the understanding that if it did not work satisfactorily, to notify the person putting it in and he would correct it. The owner of the house used the furnace through the cold weather of January and February, without complaint, until the seventh day of March, when he was requested to pay for it. *It was held*, that the circumstances warranted the conclusion that the furnace was accepted. *McBride v. McClure*, 612

Work, Labor and Services.—Where a person enters into a contract to complete a piece of work for a stipulated sum and is prevented from fulfilling it by the default of the party for whom the work is to be performed, he is excused from completing the performance and may recover *pro tanto* at the contract price. *Demme and Dierkes Furniture Company v. McCabe*, 453

CONTRIBUTORY NEGLIGENCE.

As a Defense.—Contributory negligence, such as that of a trespasser upon a railroad track, can not be relied upon as a defense, in any case where the action of the defendant is wanton, willful or reckless, and the injury ensues as a result. The comparison of negligence in such cases, under the doctrine of contributory negligence, must be understood to apply to the care required, or to the law of relation as to reciprocal duties, after discovery of the danger in which a party is, or to the recklessness or wantonness of the servants of the defendant, in failing to make such discovery, and avert the calamity. *I. C. R. R. Co. v. Beard*, 232

CONVEYANCES.

Reformation of a Deed.—R. entered into a contract with S., obligating himself, upon the payment of a certain sum of money, to convey to S. a tract of land. In the contract, S. stipulated to make a good and lawful fence around certain parts of the premises, prior to his being entitled to use and occupy the same. R. was to furnish

CONVEYANCES. *Continued.*

three strands of wire for the west, south and east sides. S. was to be at all other expense in building, repairing and keeping up the fence. Afterward, by a memorandum signed by both parties, and attached to the contract, R. agreed that, upon the payment of the other sums of money, he would convey to S. another tract of land adjoining the one named in the contract. In this memorandum it was stipulated that S. was to make, and keep up, at his cost, a good and substantial fence, that would turn all stock, not less than five feet high. S. afterward assigned the contract and memorandum to H., to whom R. and wife executed and delivered a deed, conveying to him both tracts of land. This deed contained the following clause: "The said party of the second part and his grantees, at his and their own cost and expense, to keep up a good and substantial fence, that will turn all stock, not less than five feet high." When completed the deed was folded by R. and handed to H., who accepted it without examination and filed it for record, without knowing that it was so conditioned. *Held*, upon a bill filed to expunge this clause from the deed by H., that the undertaking was personal in its character, and not in the nature of a covenant running with and attached to the land, and that H. was entitled to have it expunged from the deed. *Ross et al. v. Harben.* 192

Corporate Powers—Authority of its Agents to Bind.—The ancient rule that contracts, to bind a corporation, must be attested by its common seal, has undoubtedly been greatly relaxed. Many contracts are now sufficiently evidenced by the signature of an agent expressly authorized for the company, and as to many others, authority to bind with or without writing is implied from the scope of the agency as generally understood; but these acts are such only as are required for convenience, amounting almost to necessity, in the conduct of the ordinary business in charge of the agent according to custom. *B. S. Green Company v. Blodgett, use, etc.,* 180

CORPORATIONS.

Liability of Stockholders—Canceled Subscriptions.—The defendant signed a contract of subscription for 100 shares of the capital stock of the corporation, at the instance of the agent of the corporation, soliciting subscriptions for the purpose of enabling the agent to obtain other subscriptions to the stock. It was agreed orally between the defendant and the agent, at the time, that he should have the privilege of erasing his name afterward, if he did not want the stock. After the agent had procured other subscriptions the defendant was permitted to erase his subscription according to the agreement. Some years afterward, the corporation becoming insolvent, a receiver was appointed, and suit was brought upon the subscriptions. *It was held*, that the receiver was entitled to recover the amount of the subscriptions, and that the arrangement between the defendant and the agent was in law a fraud upon the other subscribers. *Great Western Telegraph Co. v. Haight,* 633

Subscription of Stock for the Purpose of Enabling the Corporation

CORPORATIONS. *Continued.*

to Procure Other Subscriptions.—Where a person subscribed to the capital stock of an incorporated company for the purpose of giving the agent for the company a start, and enabling him to procure other subscribers, *it was held*, that he held himself out as a stockholder, and authorized the agent to so represent him, and that he could not lawfully withdraw his subscription by reason of an agreed arrangement which he had with the agent for that purpose. *Great Western Telegraph Co. v. Haight*, 683

COUNTY COURTS.

Chancery Jurisdiction.—The County Court of De Kalb County was not invested with chancery jurisdiction by the act of 1863. *Boyn-ton v. Holcomb*, 503

Power to Determine the Extent of their Jurisdiction.—A County Court has jurisdiction in the first instance to determine what interest passes to the assignee. It is inherent in all courts in general to determine the extent of their own jurisdiction, subject to reversal for error in judgment. Where a writ of execution is issued from another court and is levied on property assigned, and such writs for any reason do not create valid liens, the assignee may, under the order and direction of the County Court, institute proceedings in the proper forum for the recovery of the property. *Mann v. Reed*, 406

Jurisdiction in Assignments for the Benefit of Creditors.—The County Court has jurisdiction to order a sheriff to make a return of assigned property to the assignee, which has been illegally levied upon after the assignment. *Mann v. Reed*, 406

COURTS.

Finding of the Trial Court.—The finding of the lower court is always given great weight in the Appellate Court, from the fact that the judge trying the case and hearing and seeing the witnesses, is in better position to judge of the weight proper to be given to the evidence than the Appellate Court, that court not having the benefit of the presence of the witnesses and of hearing them testify; therefore, unless the finding of the court below is greatly against the weight of the evidence, its judgment will not be disturbed. *Loucheim v. Seyfarth*, 561

DAMAGES.

In action upon a contract to convey lots, where the consideration was the construction and operation of a street car line and the conveyance of the lots, the damages can not be estimated from proof of the difference between the contract price and the market value of the lots at the time of the breach of the contract. *Coddington v. Hoblit*, 66

Elements in Arriving at Value of Growing Crops.—In estimating the value of growing crops destroyed, it is proper to take into consideration the fact that the land was very fertile and productive and that it had produced, for a series of years, crops which were larger and brought better prices than the average. *Economy Light & Power Co. v. Cutting*, 422

DAMAGES. Continued.

Excessive.—In an action for tearing down a shed, where the evidence shows the actual damage to be \$80, a verdict and judgment for \$200 can not be sustained, where there is an absolute want of proof of malice. *Thompson v. Evans*, 289

Exemplary—Not Proper, When.—Where an act, complained of as a trespass, was done by an officer without malice, under a mistaken idea of the law, and while endeavoring to discharge his duty, it is improper to award exemplary damages. *Thompson v. Evans*, 289

Expenses, etc.—The recovery is limited to the financial or pecuniary loss of the wife and next of kin by the death of the husband and father, and the expenses incurred or paid for medical attendance, care or nursing, or otherwise, in the endeavoring to effect a cure. The agony and pain suffered and endured by him, the loss of earnings while sick or disabled by the injury, can not be considered in estimating the amount of damages. The sole measure of damages is the pecuniary loss to the widow and next of kin, occasioned by the destruction of the life of the husband, etc. *Maney v. C., B. & Q. R. R. Co.*, 105

Growing Crop—Overflow of Water.—Where damages for the destruction of a growing crop is sought to be recovered, the measure of damages is the value of the crop as it was when destroyed, with the right to the owner to mature and harvest or gather it at the proper time. The value of the crop is a matter of estimate or conclusion of the mind to be arrived at from all the facts which would affect it. *Economy Light and Power Co. v. Cutting*, 422

Trespass—Mining Under the Premises of Another, etc.—In an action for damages resulting from the defendant's mining under the plaintiff's premises the damage must be confined to the direct results of the wrongful acts and must not include elements of other causes. *Monmouth Mining and Mfg. Co. v. Regmier*, 385

When Excessive.—The question of damages is one peculiarly within the province of the jury, after hearing the evidence, and unless it appears that they have been governed by passion or prejudice, the Appellate Court will not interfere with the verdict. *City of Joliet v. McCraney*, 381

When Not Excessive.—In an action for the destruction, by an overflow of water, of two acres of cabbages, some small and some large enough to stop cultivating, half an acre of sweet corn, one acre of potatoes, and also tomatoes and cucumbers, and three acres of land prepared for setting with cabbage plants, the plants in hand ready for setting, the jury assessed the damages at \$577.80. *Held*, not excessive. *Economy Light & Power Co. v. Cutting*, 422

DEATH.

By Negligent or Willful Act—Common Law Liability.—At the common law a person injured by a wrongful act, neglect or default of another, might, if the injuries were not fatal, maintain an action to recover damages, but the remedy abated upon the death of the person injured. So, if instantly killed, no right of action existed,

DEATH. Continued.

and no action would lie in favor of any one for causing the death of a human being *Maney v. C., B. & Q. R. R. Co.*, 105

DEBTOR AND CREDITOR.

Fraudulent Transfer of Property.—A debtor can not dispose of his property in secret trust for himself so as to defeat existing creditors in the collection of their debts. Although such a transaction may have a valuable consideration, it is fraudulent as to creditors, because it places beyond their reach valuable right, and gives to the debtor the enjoyment of what rightfully belongs to them. It is wholly immaterial in such a case to show that no actual fraud was intended, for the result would be the same. *Rutt v. Shuler, Administrator, etc.*, 655

DECREES.

In Part Erroneous.—Where a decree is in part erroneous as to the findings of the trial court, but otherwise correct, it will be reversed as to such erroneous findings, and affirmed in other particulars. *Mann v. Harrison*, 408

DECREES OF COURT.

By Whom Executed.—A decree of the Circuit Court can be legally executed only by an officer of the Circuit Court. *Boynton v. Holcomb*, 503

DEDICATION.

Evidence of Parol Dedication.—Proof of a parol dedication must clearly show an intention on the part of the land owner to dedicate, but the proof may consist of acts of the owner mutually indicative of such intention, or his acquiescence in the use of the land in question, and under circumstances which would reasonably forbid such acquiescence if there was no such intention. *I. C. R. Co. v. The People*, 538

Lands of Minors Dedicated by Occupant, etc.—Estoppel, etc.—Where a person, not the owner of lands which were adjacent to a highway, changed the location of the highway by moving fences, etc., and the minors, in whom the title of the lands was vested, acquiesced in such change and re-location after they became of age, and sold the lands to another, it was held, that they were bound by the original act of re-location as to all rights required by the public by reason thereof. *Green v. Stevens*, 24

DEFENSES.

Action on Bonds—Filling Blanks.—It is no defense to an action on a bond, that the names of the sureties and the amount of the penalty were inserted in the appropriate blanks by the principal obligator after the execution, and before the delivery of the instrument and without the knowledge or fault of the obligee. *Donnell Mfg. Co. v. Jones*, 827

DISMISSAL.

Of Appeal for Non-Compliance with the Rules of the Court.—Under a rule of the Circuit Court, providing that whenever the appellant

DISMISSAL. *Continued.*

neglects to have the case docketed, the appellee may do so, and obtain an order upon the appellant to refund the costs necessarily advanced by him in so doing. *it was held*, that the rule covers only such costs as may be necessarily [advanced]. This necessity is not one which arises from the compulsion of the clerk, or from long continuing acquiescence of attorneys and their clients, or from the order of the court requiring the payment of illegal fees. It is necessary to advance none but legal fees. The appellant has the right to refuse to pay any fees except those legally chargeable, and his appeal can not be dismissed for such refusal. *Hanford v. Hagler*, 258

DIVORCE.

Accusation of Unchastity in Connection with Acts of Cruelty.—In a proceeding for divorce, it was shown in connection with some acts of cruelty, that the husband had accused his wife of adultery. The court refused to allow him to show what cause his wife had given him to suspect her of unchastity. *This was held error*, because it might have explained the animus of the charge of adultery and show that it was not maliciously made, and might possibly show that the accusation was true. *Nullmeyer v. Nullmeyer*, 573

Cruelty—Condonation.—Acts of cruelty, considered as a cause for divorce, may be condoned. *So held* where the only acts complained of as grounds of divorce were two between 1874 and 1875, another in 1882, and an accusation of adultery in 1886, the parties continuing to live together as husband and wife in a peaceable and contented way for over four months after the accusation of adultery was made, when the wife abandoned the husband without any new cause. *Nullmeyer v. Nullmeyer*, 573

Delay in Separation—Condonation.—Where delay in separation has occurred, the party bringing the suit must in some way account for such delay, for, in the absence of the explanation, the court ought not to be called upon to relieve a party of that which his own conduct has shown to be not grievous to him. *Nullmeyer v. Nullmeyer*, 573

DIVORCE PROCEEDINGS.

Evidence Must Support the Decree.—Where, in a proceeding for divorce, the cause is submitted to a jury, the evidence must be sufficient to support the verdict, or a decree based upon it will be set aside. *Nullmeyer v. Nullmeyer*, 573

DRAM SHOPS.

Parties in Action for Damages.—It seems that under Sec. 9 of the Dram Shop Act, allowing a joint or several action to be brought, the person or persons entitled to the action may sue jointly. The fact whether they can or not, is a mere technicality of law, and should be taken advantage of, if at all, in apt time. Where all join, a multiplicity of suits is avoided and no damage done to the defendants, because in the distribution of the property among the plaintiffs, the defendant is an indifferent party. *Helmuth v. Bell*, 626

EJECTMENT.

Of Passenger from Sleeping-Car—Act of Railroad Company.—A passenger holding a second class passage ticket for his transportation over the lines of a railroad company, purchased a sleeping-car ticket and gained admission to the sleeping car before the matter was discovered. Holders of second class railroad tickets not being permitted to travel in the sleeping-car by the rules of the railroad company, he was ejected by the railroad's employes, assisted by the servant in charge of the sleeping-car. In a suit for damages, *it was held* that the expulsion from the car was the act of the railroad company and not of the sleeping-car company. *Pullman's Palace Car Co. v. Lee*, 75

ENDORISING WITNESSES.

Upon the Back of the Indictments.—In the prosecution of misdemeanors the law does not require the names of witnesses to be placed upon the back of the indictment. *McDonald v. The People*, 357

ERROR.

One Person Suing Out a Writ Can Not Assign Error for the Other.—One of two defendants sued out a writ of error, the other did not. In the Appellate Court *it was held* that the one suing out the writ could not assign error in the judgment affecting only the one who did not. *Barnard v. Reynolds*, 596

ESTATES.

Estimating Value of, etc.—Tables.—Where it is necessary for the jury to determine the comparative value of a life estate and remainder in real property, it is competent to show and give in evidence computations, made by experts, under the various tables in general use, made by compiling statistics, and showing the general expectancy of life. *City of Joliet v. Emma Blower*, 464

Postponement of the Vesting.—It is familiar law that an intent to postpone the vesting of an estate must be clear and manifest and must not arise by mere inference of construction. *Kelly v. Gonce*, 82

ESTOPPEL.

Doctrine of—When Applied.—The doctrine of equitable estoppel can not be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act which, though void, has been open to the inspection of all. *Boynton v. Holcomb*, 503

Essential Elements.—The essential elements of an estoppel *in pais* are, misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance upon his part in acting upon the representations. *Boynton v. Holcomb*, 503

ESTOPPEL IN PAIS.

Fraud.—An estoppel *in pais* is based upon a fraudulent purpose and a fraudulent result. Before it can be invoked to the aid of a litigant, it must appear that the person against whom it is to be invoked

ESTOPPEL IN PAIS. *Continued.*

has, by his words or conduct, caused him to believe in the existence of a certain state of things and induced him to act upon that belief. If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party can not say he has been deceived thereby, and is entitled to the application of the rule.

Boynton v. Holcomb,

503

EVIDENCE.

Acts Having no Reference to the Subject-Matter of the Suit, Inadmissible.—On the trial of an action based upon the wrongful opening of a ditch, it is not error to exclude evidence of matter which has no reference to the subject-matter of the complaint in the declaration but has reference only to some contemplated act in the future. *Reed v. Rich,*

262

Admissibility Under Allegations of the Declaration.—Under a declaration charging that dirt, waste coal, waste material and other refuse matter from the coalshaft were deposited either directly or through the agency of a stream upon the plaintiff's land, rendering it unfit for cultivation or tillable purposes, evidence of damages by water occasioned by the obstruction of the channel of the stream by the coal so as to flood his land and destroy crops by the action of the water, is inadmissible. *The Coal Run Coal Company v. Giles,*

585

Admissibility—Under Allegations of the Declaration.—Under a declaration charging that the defendant occupied the premises and operated a mine, it was held, that the plaintiff could not recover for an injury sustained by him from the wrongful acts of the defendant's tenants. *Coal Run Coal Co. v. Giles,*

585

Books of Account—Footings.—Footings in books of account form no part of the original entries and are not admissible in evidence as such. *McAmore v. Wiley,*

615

Books of Account—Foundation for Admission in Evidence.—It is error to admit books of account in evidence without making the preliminary proof of the facts required by Sec. 3, Ch. 51, Revised Statutes. *McAmore v. Wiley.*

615

Burden of Proof.—"Under a declaration which charged negligence in not keeping the cars and machinery thereof in good repair, but which, on the contrary, were out of repair, and not sufficient for the purposes used," it is incumbent upon the plaintiff to prove not only a defect in the machinery, but the defect that caused the injury. Merely proving that there was a defect is not sufficient: not only so, but under the averments of the declaration, the proof must show that the defect causing the injury was known to the defendant, or, by the exercise of reasonable care, it could have been known. *C., C. & St. L. Ry. Co. v. Dixon,*

292

Competency as to Stock Killed.—In an action against a railroad for killing domestic animals, it was shown, that a witness was competent to testify upon the subject of values; that he had heard the animals described in the suit by the plaintiff and others, and was asked what was a fair cash value of the animal killed, but was not permitted to

EVIDENCE. *Continued.*

answer. *It was held*, that the witness had not brought himself within the rule, for at the time the question was asked, it had not been shown that he had heard all the evidence on the subject about which his opinion was asked. *Chicago, M. & St. P. Co. v. Kendall*,
398

Contents of a Lost Letter.—A witness, upon the trial of two persons upon the charge of conspiracy, was permitted to testify to the contents of a letter, written to her by one of the defendants. It appeared, from the evidence of the witness, that this defendant had been in correspondence with her for some time, in regard to the sale of certain property, and when the other defendant visited her for the purpose of procuring a bill of sale of the property, he took the letter from a basket in her room. Under this state of facts, *it was held* proper to allow proof of the contents of the letter, it sufficiently appearing that the defendants were acting in concert. *Medley v. The People*,
218

Discussion of Evidence.—In discussing the evidence the court arrives at a conclusion different from the finding of the court below, and reverses the judgment. *Payne v. Newby*,
141

Effect of Improper, Cured by Instructions.—In an action against a railroad company for killing horses, the plaintiff was allowed to introduce evidence of the condition of the fence through which it was claimed they got upon the track, for a considerable distance from the place in question, along the lands of the plaintiff, and for years prior to the accident. *It was held*, that such evidence was irrelevant; but, an instruction being given to the jury at the instance of the defendant, that they had "no right to consider in coming to a conclusion in the case, whether or not the fences of the defendant were good or poor, sufficient or insufficient, on the sides of its right of way adjoining the premises of the plaintiff, other than the panel of fence through which the animals got the night they were injured," *it was held* that this instruction properly eliminated the objectionable evidence from the case, and that no harm resulted to the defendant from its admission. *C., M. & St. P. R. R. Co. v. Kendall*,
398

Evidentiary Facts—Evidence of the Ultimate Fact.—Upon the issue of notice in the assignee of commercial paper, evidentiary facts may be shown for the purpose of proving the ultimate fact of notice of the defense, but such fact must be established, which, when done, constitutes bad faith of the assignee in the language of the law. *Webber v. Indiana Nat. Bk.*,
336

Former Controversies.—In an action of trespass for personal injuries, the merits of former controversies occurring some weeks before the affair in question, are not material in determining the defendant's liability for committing the assault; whether the plaintiff was right or wrong or whether his conduct was commendable on other occasions, is not in issue. *Hulse v. Tollman*,
490

Hypothetical Questions as to Values.—Where a hypothetical

EVIDENCE. *Continued.*

question is put to a witness for his opinion in regard to the value of an animal, the question must be full enough to form a basis for an opinion, and must omit no important qualities of the animal affecting its value, about which there is no dispute, and which would necessarily influence an opinion. *C., M. & St. P. R. R. Co. v. Kendall*, 398

Photographs of Premises in Question.—Upon the trial of an action against a railroad company for killing domestic animals which had got upon their track through a defect in the fences adjoining the same, the court refused to admit in evidence a photograph of the broken fence boards, the broken boards being in court and offered in evidence. *It was held* that the photographs, which exhibited only a partial view of them, were properly refused. *C., M. & St. P. R. R. Co. v. Kendall*, 398

Refusal to Admit Competent Evidence Not Necessarily Reversible Error.—The refusal to admit evidence which is competent, where the same matter has been proven by other witnesses, without objection, and is substantially before the jury, is not necessarily error, for which judgment should be reversed. *Reed v. Rich*, 263

Reputation of a Servant Not Competent.—Upon the trial of an action against a railroad company for personal injuries, based upon the ground of retaining in its employ an incompetent and habitually negligent engineer, witnesses were called for the express purpose of proving that the engineer was known by the nick-names of "Crazy Pete" and "The Wild Irishman," and were permitted to testify over the objection of the defendants. *It was held* that this evidence was not proper to show either that the engineer was negligent or incompetent, and was prejudicial to the defendant. *St. L., A. & T. H. R. R. Co. v. Corgan*, 129

Statements Made at the Time of Doing an Act.—The statement of a party, made at the time of doing an act, may be shown in evidence in connection with, and as a part of the act. So, where a party, claiming to have deposited a sum of money in a bank to the credit of a third party, a clerk of the bank who testified that no money had been deposited to the credit of said party, was asked, on cross-examination, whether, at about the time in question, a deposit had been made, and, having answered in the affirmative, he was then asked, "What was said at the time by the party making the deposit?" *It was held*, that an objection to the question was properly overruled. *Medley v. The People*, 218

Weight to be Given to Testimony.—Where, in an action against a railroad company for killing horses, a witness testified that he knew the value of horses generally in the vicinity, and had seen the horses about which he testified, the cross-examination developed the fact that he had but little knowledge on the subject, and slight opportunity to judge of the value of horses, *it was held*, that the cross-examination only affected the weight to be given to it, but did not render it incompetent. *C., M. & St. P. R. R. Co. v. Kendall*, 398

EXCEPTIONS.

Record.—A record which contains no proper exceptions presents no questions for the consideration of an appellate court. *State Bank of Tonawanda v. Dawson, Sheriff*, 256

To Rulings of the Court upon Evidence Heard in the Absence of the Jury.—Where the court heard evidence in the absence of the jury, upon the question of the execution of a lease, to which no exceptions were taken, but an exception was taken to the ruling of the court upon the question, the record not showing that any of the testimony so heard by the court was repeated in the presence of the jury, or that any remark or ruling of the court made while the jury was absent was repeated or referred to afterward in the presence of the jury, *it was held*, that the party objecting could not have been prejudiced by any evidence heard, or ruling made, when the jury were absent. *Tucker v. Burkitt*, 278

Waiver, etc.—Where an exception has been preserved to the ruling of the court, but has not been considered by counsel sufficiently important to require mention in his argument, it will not be noticed by the Appellate Court. *Tucker v. Burkitt*, 278

EXECUTION.

Must Be Under Seal.—An execution issued from a court of record which lacks the seal of the court is void. *Mann, Assignee, etc., v. Reed*, 406

FALSE REPRESENTATIONS.

Commercial Agencies.—The false representation must be shown to have been made to the vendor or to a commercial agency, whose business it is to ascertain the financial condition of dealers and report to its customers. The business of commercial agencies is well understood in the commercial world, and a false and fraudulent statement made by a retail dealer to one of them upon which a vendor is induced to extend credit, would be followed by all the consequences of a false statement made directly to the vendor. *Staver & Abbott Mfg. Co. v. Coe*, 426

FALSEHOOD AND DECEIT.

Moral and Legal Wrongs.—Falsehood and deceit are always subject to moral condemnation, but it is not appointed to human tribunals to sit in judgment upon mere moral delinquencies or abstract wrongs, affecting only the conscience; such tribunals take cognizance of delinquencies and wrongs, only when another has been induced by them to do some act to his own injury. Deceit and fraud, if not acted upon, or if not accompanied by injury, are moral, not legal wrongs. *Mahoney v. Whyte*, 97

FORCIBLE DETAINER.

A suit in forcible detainer is governed by the same rules as other cases at law except that the plea of not guilty is sufficient to admit evidence of any defense to the merits. *Shepardson, Ex'r, v. McDole*, 350

FORCIBLE ENTRY AND DETAINER.

Possession.—Where the evidence fails to show that the plaintiff

FORCIBLE ENTRY AND DETAINER. *Continued.*

had possession of the land in controversy, the suit must fail. *Kimmel v. Frazer*, 462

Title.—The means by which the parties obtained title to real property, can not be considered in an action of forcible entry and detainer. *Kimmel v. Frazer*, 462

FRAUD.

Misrepresentations Knowingly Made.—Misrepresentations knowingly made are sufficient to warrant an inference of fraudulent intent, but to hold that the intention of the party making the misrepresentation is immaterial would be against authority and principle. *Staver & Abbott Mfg. Co. v. Coe*, 426

Not Presumed—When.—Where a firm engaged in merchandising, sold out their business to another firm, to whom they were indebted in a large amount, and the purchasers took possession immediately, removed the sign board, put their own in its place and advertised the change, *it was held*, that the sale was not necessarily fraudulent because one of the firm of the vendors was employed to remain in the store as a salesman, by the purchasers, after the sale. *Loucheim v. Seyfarth*, 561

Pari Delicto—The Rule in Equity Not Always Applied.—L., being indebted to different persons, applied to H. for legal advice, procured from him a small advance of money, and under his advice conveyed to him a large amount of property, ostensibly for the purpose of securing H., but really for the purpose of hindering his creditors. H., having received the return of the amount of money advanced by him out of the rents and profits, a proceeding in chancery was had to compel, among other things, a re-conveyance of the property. *It was held*, that the parties being, one, legal adviser and the other client, and by the advice of the former being adopted, he procured the latter's interest in real property. they were not in *pari delicto*, and that the rule of equity which denies relief to one party against another when both have engaged in a fraudulent transaction should not be applied. *Herrick v. Lynch*, 657

Parties in Pari Delicto—Attorney and Client.—Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract, which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices. *Herrick v. Lynch*, 657

FRAUDULENT ACTS OF AN AGENT.

Reasonable Care by Persons Dealing with Him.—As a general rule, the law does not protect one whose want of ordinary care has resulted in placing his adversary in an unfavorable position. When, under such circumstances, he seeks to cast the burden which must be borne by one of them, upon the shoulders of the other, he is told that had he exercised such care as might be expected of a reasonably prudent man, the loss would not have occurred. *McFadden v. Lynn*, 166

FRAUDULENT CONVEYANCES.

Secret Trusts.—A person against whom a judgment was recovered, sold his real estate for its full value to his son, and being a widower, advanced in years, called together his children, and in consideration of their verbal agreement to support him so long as he should live, made a distribution of his property among them. *It was held*, that this distribution of his property was fraudulent as to creditors, whether done for the purpose of hindering and delaying his creditors or in good faith. *Rutt v. Shuler*, 655

What is Not.—A judgment debtor, being the owner of real estate, sold it to his son for the full value, and having received payment for the same, distributed the proceeds among his children in consideration of their agreement to support him. *It was held*, that the conveyance of the real estate was not fraudulent as to judgment creditors, and a decree making it subject to the judgment and execution was reversed, it not appearing that the agreement between the father and the children entered into the consideration for the conveyance. *Rutt v. Shuler*, 655

GARNISHMENT.

A garnishee may be, and indeed for his own safety, is, bound to inquire into the validity of the proceedings against his creditor, to the extent of seeing that the court had jurisdiction to render the judgment against his creditor. *Hinman v. Andrews Opera Co., use of, etc.*, 185

GROSS NEGLIGENCE.

Not in Law an Intentional Mischief.—Gross negligence, of itself, is not, in law, a defined and intentional mischief, although it may be cogent evidence of such fact. The term is not one, which, grammatically at least, and apparently not in law, though frequently so applied, is a subject of comparison. *I. C. R. R. Co. v. Beard*, 232

HIGHWAYS.

Encroachments by Fencing—Acceptance and Dedication, etc.—If, when a man owning the land adjacent to, encroaches upon, a highway by fencing, he gives to the public another way, outside of his fence, connecting with the road, the way so given may be accepted by the public, and in such case there will be as to such portion, a public highway by dedication. A road so acquired will be just as binding on the land owner as though it had been laid out in the first instance by the authorities, and the owner can not thereafter withdraw it. *Green v. Stevens*, 24

Obstruction.—Section 77, Ch. 174, R. S., providing that no railroad corporation shall obstruct any public highway by stopping any train upon, or by leaving any car or locomotive engine standing on its tracks where the same intersects or crosses such public highway, is not violated unless the train, car, or locomotive stopped or left standing thereon forms an obstruction to travel. *I. C. R. Co. v. The People*, 588

Obstruction by Cars, etc.—Sec. 77 of chapter 174, R. S., which provides that no railroad corporation shall obstruct any public highway

HIGHWAYS. *Continued.*

by stopping trains upon, or by leaving cars or locomotives standing upon its track where the same crosses such highway, is a penal statute, which, by well established rules of construction, must be strictly construed, and in a prosecution under it, it is not sufficient to show that the company left a car standing on its track where the same intersects or crosses a public highway. It must be shown that the car or locomotive obstructed public travel. *Illinois Central R. Co. v. The People*, 540

Obstructions by Railroad Companies—Parol Dedication.—In an action against a railroad company for obstructing a public highway crossing, it appeared that the public had used the crossing for thirty years, and that until a short time before the commencement of the suit, the company had recognized its right to do so. In the construction of a building on its right of way, it had left an opening the width of the street, and constructed approaches from both sides. It had constructed and maintained a plank crossing for the convenience of the public, erected and maintained at the place, a sign-board, reading, "Railroad crossing, look out for the cars," and a portion of the time had kept a flagman there. *It was held*, that independent of any right acquired by the public by reason of long and continued use, such acts by the company furnished strong evidence of a parol dedication. *Illinois Central R. Co. v. The People*, 531

HUSBAND.

Legal Liability at Common Law.—A husband's liability at common law, rested solely upon the reason that by the marriage, he acquired such a legal right in whatever property she had, and such control of her labor and earnings as deprived her of the means of payment. *Catherine Clark v. Turner A. Clark*, 163

HUSBAND AND WIFE.

Misjoinder as Parties Plaintiff.—Where a husband and wife sued jointly to recover damages for an alleged injury to the person of the wife, *it was held*, that the husband was improperly joined with the wife as a co-plaintiff in the action. *The Knights Templar and Masons' Life Indemnity Co. v. Gravett et al.*, 252

Next of Kin—Statutory Doctrine.—The enactment of our statute established the doctrine that the wife and next of kin, and each of them, have a property right and financial interest in the life of the husband and relative. A new right of action was created in favor of persons who, before, had neither right, cause of action, nor remedy. Prior to its enactment, this right ceased at the death of the husband; it did not flow from him, but was created by the statute. The widow and the next of kin can not be deprived of it at the will or pleasure, or by the contract of another, though he be the party charged with the performance of the duties out of which the right grew. *Maney, Administratrix, etc. v., Chicago, Burlington & Quincy R. R. Co.*, 105

Power of the Husband to Release the Wife's Right.—The value of the interest of the wife and children in the life of the husband and

HUSBAND AND WIFE. Continued.

father, and the amount of their financial loss in case of his death, is limited by statute, and it is wholly beyond the power of the husband and father to further limit their right of recovery, by any contract he may enter into. *Maney v. C., B. & Q. R. R. Co.*, 105

Statutory Remedies.—The glaring absurdity of the common law in allowing a husband and father, if injured and not killed, a right of action for the damages thus sustained, and in denying to his widow and children any compensation for damages inflicted upon them, should the injury be greater and result in death, has been relieved by the act of our General Assembly, approved February 12, 1853, re-enacted in 1874, and now constituting sections 1 and 2, Ch. 70, of our Revised Statutes. *Maney v. C., B. & Q. R. R. Co.*, 105

IMPROVEMENTS. ETC.

When They Do Not Inure to the Owner of the Land.—Where a person takes possession of a building by direction of the agent of the owner, and with the understanding that he is to have a bill of sale of the same at an agreed price, both persons treating it as personal property, and as severed and disconnected from the land, and a license to use the land, then such person can enter on such land and make improvements without such improvements becoming the property of the owner of the fee. *Medley v. The People*, 218

Injunctions—Levy of Execution.—Where a person seeks to enjoin the levy of an execution, and to prevent future complications by declaring the judgment upon which it is issued null and void, it is necessary to show that such person has some property which could be seized upon such execution, or subjected to the lien of the judgment. *Titsworth v. Cook et al.*, 307

INSTRUCTIONS.

It is error to refuse an instruction which states the law correctly and contains propositions of law which are not embraced in other instructions given to the jury. *City of Streator v. Hamilton*, 449

As a Series—Notice to an Assignee of Commercial Paper.—A series of instructions upon the question of notice to an assignee of commercial paper which assert the law on the subject to be, "Where the bill has passed to the plaintiff without any proof of bad faith in him, and there is no objection to his title, suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, it will not defeat his title; that result can only be produced by bad faith on his part," properly state the law. *Webber v. Indiana Nat. Bk.*, 336

Based upon Evidence.—Instructions should be given with reference to the facts of the case. So, where the proofs showed that two persons took possession of a building by direction of the agent of the owner, who proposed to sell it and to execute a conveyance of it to them, both parties treating the same as personal property, and as severed from the land, an instruction stating, "If one person takes possession of and makes improvements on the real estate of another

INSTRUCTIONS. *Continued.*

without authority of the owner, such improvements inure to the benefit of the owner, and the person so taking possession does not thereby take a valid claim in law on such real estate, and if, in such cases, the owner sells the property on fraudulent pretenses or misrepresentations made to him by her, this is not obtaining property from the person taking possession as aforesaid, by false pretenses," is not proper. *Medley et al. v. The People*, 218

Based on Particular Parts of the Evidence.—An instruction predicated upon a particular part of the evidence, and which selects out a single feature, on which it is based, and ignores other evidence, or which selects a particular branch of the testimony and calls specific attention to it without alluding to the gist of the main question at issue, and seeks to make the case turn on relative rights not in issue, is improper. *Medley v. The People*, 218

Burden of Proof.—An instruction which makes the proof on the part of the defendant supply the preponderance of the evidence which the law requires of the plaintiff, and gives him a verdict without proof, is erroneous, as it improperly shifts the burden upon the defendant. *McAmore v. Wiley*, 615

Character in Actions of Slander.—In an action for slander it is error to refuse to instruct the jury that evidence of the plaintiff's general reputation as a law-abiding citizen is only intended in mitigation of damages, and not as an impeachment of his character for honesty and integrity. *Balcom v. Michels*, 379

Departure from the Issue on Trial.—Where a cause of action is based upon the want of repairs, and knowledge of such condition, an instruction which states that the master of a railroad company, or employer, is bound to use reasonable care, skill and judgment, to furnish suitable machinery and implements properly constructed, and ordinarily skillful and trustworthy agents or workmen, and if the employer does not use such care, skill and judgment, and injury results therefrom to an employe, the employer will be responsible for such injury, is erroneous, because it makes his liability depend upon furnishing of machinery, properly constructed, which is not made an issue in the case, either by the pleadings or the evidence. *C., C. & St. L. Ry. Co. v. Dixon*, 292

Duty of Trial Court.—It is not the duty of the trial court upon its own motion, and without any request from the defeated party, to set aside the verdict and grant a new trial, because of errors in the instructions. *I. C. R. R. Co. v. O'Keefe*, 320

Erroneous but Harmless.—In an action against a railroad company for obstructing a public highway by stopping any trains upon, or by leaving any cars or locomotive engines standing on its track where the same intersects or crosses such highway, the court erroneously instructed the jury that it was sufficient to render the company liable if the proof showed that it left any car standing on the track where the same intersects the crossing, but the evidence was clear that the cars did on the day alleged obstruct the crossing, and

INSTRUCTIONS. *Continued.*

there being no countervailing testimony, *it was held*, that no harm was done by giving it. *I. C. R. Co. v. The People*, 542

Erroneous—Conflict of Evidence.—Where there is a conflict in the evidence upon a material branch of the case, the giving of an erroneous instruction is sufficient ground for reversing the judgment, although it would not be so were it not for the conflict of evidence. *I. C. R. Co. v. The People*, 540

Erroneous—Not Always Reversible Error.—Where a verdict is clearly in accordance with the evidence in the case, and it is apparent that justice has not been affected by the giving of an erroneous instruction, such error will not require a reversal of the judgment. *Reed v. Rich*, 262

Erroneous, Not Cured by Proper Ones, Unless, etc.—An erroneous instruction is not cured by the giving of a proper one for the opposite side, unless the court can see, everything considered, that the jury were not misled, and that the verdict was clearly the proper one. *Demme & Dierkes Furniture Co. v. McCabe*, 453

Error in Giving—When Not Material.—When an erroneous instruction has been given, but the Appellate Court is satisfied that the result of the suit was not affected by it, and the jury was not misled, the error is not material. *Biederman v. Brown*, 483

Governing the Law of Notice—Personal Injuries.—In a case against a railroad company for injuries, based upon a want of repair of a coupler and notice of such condition, an instruction which states that if the plaintiff, while in the exercise of reasonable care, was injured while attempting to make a coupling, and that said injury was caused by reason of the coupler and the machinery connected therewith being out of repair, the jury should find for the plaintiff, is erroneous, because it ignores the law of notice and makes the liability depend solely on there being a defect at the time of the injury, and such defect being the cause thereof, without reference to when the defect occurred, or that by the exercise of reasonable care it would have been discovered by the company before the injury occurred. *C., C. & St. L. Ry. Co. v. Dixon*, 292

Liability of Parent for the Debt of a Child.—An instruction which states that if the jury believe from the evidence that the plaintiff sold the minor child of the defendant, articles of clothing, and that the same were necessities suitable to the condition of said child, and that the defendant authorized the plaintiff to sell and furnish her minor child with goods on her credit, by either direct instructions or by circumstances which would lead a reasonable man to infer that the defendant would pay for the goods, then the verdict must be for plaintiff, is erroneous. Parents often pay debts improvidently made by children when there is no legal obligation to do so. It is sometimes done from a spirit of pride and sometimes to prevent unpleasant consequences; under such circumstances a reasonable man might infer that a parent would pay. *Miller v. Davis & McKinney*, 377

INSTRUCTIONS. *Continued.*

Must Be Accurate Where the Evidence is Conflicting.—In an action where the contention on the questions of fact was as to whether the plaintiff had been paid for all services rendered by him, and whether he had been discharged without cause before the expiration of the time for which he was employed, and if so, whether he might have obtained employment, and on most, if not all of these questions, the evidence was conflicting, *it was held*, that in this condition of the evidence, the instructions must be accurate. So an instruction for the defendant stating that “if the plaintiff was employed to work for the defendant by the month, and it has paid him in full all it owed him,” the jury must find for the defendant, is erroneous because it ignores the question as to whether a contract had been made for any definite length of time, and the plaintiff discharged without cause. *Kelley v. Louisville & N. R. R. Co.*, 304

Must Not Assume the Existence of Facts.—In an action for the recovery of damages for personal injuries against a railroad company upon the ground that its machinery was out of repair, an instruction which apparently assumes such to be a fact, is erroneous. *C. C. & St. L. Ry. Co. v. Dixon*, 293

Notice of Defects in Sidewalks.—An instruction which states that, if a city had no actual notice of defects in a sidewalk, and that it was in such a condition as to appear safe and free from defects to those having occasion to pass over it, the city would not be liable, is erroneous and properly refused. It is the duty of a city to use reasonable care in discovering defects in its sidewalks, and to repair them. *City of Joliet v. McCraney*, 381

Owner of Premises Injured by Fire.—In action against a railroad company for burning a meadow, the court instructed the jury that “it shall not, in any case, be considered negligent on the part of the owner or occupant of the property, that he has used the same in the same manner, or permitted the same to be used or remain in the same condition, it would have been used or remained, had no railroad passed through or near the property so injured. *Held*, proper under the evidence, no question of due care on the plaintiff's part being raised. *T., St. L. & K. C. R. R. Co. v. Kingman*, 43

Previous Threats and Present Danger.—An instruction in an action of trespass to the person, where self-defense is relied upon, which states to the jury that they have a perfect right to take into consideration threats of the plaintiff, without requiring a belief that some act was done to carry them into execution is erroneous, where the question as to whether such act was done is a disputed fact; unless the jury did believe from the evidence that some such act was done, the threats could not be considered. *Hulse v. Tollman*, 490

Province of the Jury to Determine the Credibility of the Witnesses.—It is the province of the jury to determine the credibility of the witnesses, and an instruction which takes from them the right of weighing the testimony is erroneous. *Kelley v. L. & N. R. R. Co.*, 304

INSTRUCTIONS. *Continued.*

Reasonable Belief in Self-Defense.—In an action for assault, an instruction stating that if the jury believe, “that the defendant believed that he had a reasonable ground to believe that the plaintiff meant to do him a bodily injury, he might assault him,” is erroneous. His belief must have been such as a reasonable person would entertain under the circumstances. His belief that the grounds of his belief were reasonable will not justify him. *Hulse v. Tollman*, 490

Reference to Other Instructions in the Case.—An instruction which refers to the other instructions in the case, and which does not require the jury to believe any fact from the instructions, but merely informs them that “if, under the evidence and instructions, they believe the defendant liable and give a verdict for the plaintiff, they shall assess the damages,” is proper. *C., M. & St. P. R. R. Co. v. Kendall*, 398

Rewards for Information Concerning Thief.—In a suit to recover the amount of a reward for the discovery of a person who stole a harness, *it was held* error to instruct the jury to find for the plaintiff, if he discovered who stole the harness, and informed the defendant without requiring that he should have been the first person who ascertained the facts leading to the discovery of the thief or the first who communicated it to the defendant. *Higgins v. Lessig*, 450

Self-Defense.—Where, in action for assault, there is evidence tending to show that the defendant had provoked the assault, it was error to instruct the jury that defendant had a right to assault the plaintiff and knock him down in order to protect himself, regardless of the fact that he provoked the difficulty where none would have otherwise occurred. *Hulse v. Tollman*, 490

Waiver in Giving.—If the defeated party does not ask the court for a new trial, such neglect will be treated as a waiver of error, in giving or refusing instructions. *I. C. R. R. Co. v. O'Keefe*, 320

INSURANCE.

Appraisement Clause—Condition Precedent.—Where an appraisal clause in a contract of insurance provided that in the event of a disagreement as to the amount of loss between the insurer and insured, the loss should be ascertained by two disinterested appraisers, the insured and the company each selecting one, who were first to select an umpire, with power to decide any difference between them, *it was held* that the provision was legal and that a compliance therewith was a condition precedent to the bringing of the suit to recover damages for loss under the policy. *Niagara Ins. Co. v. Bishop*, 388

Duty of Appraisers Under the Policy.—Where a policy of insurance contained a clause that in the event of a disagreement as to the amount of loss, the amount should be ascertained by two disinterested appraisers, as a condition precedent to bringing a suit upon the policy, the appraisers, when appointed, stand for the parties appointing them; if either improperly neglects his duty, the party appointing him is responsible for such neglect. If either insists upon

INSURANCE. *Continued.*

unreasonable requirements which have the effect to defeat the appraisal, his principal is responsible therefor; and in case the appraiser representing the insurance company acts in such bad faith as to prevent an accomplishment of the appraisal within a reasonable time, the insured is absolved from a further compliance with the provisions of the policy and may bring his suit for the loss at once.

Niagara Ins. Co. v. Bishop,

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False Statements in the Application.—A condition in the policy was that the entire policy should be void “if the interest of the assured was other than unconditional and sole ownership in fee, free from all liens whatever, or if the subject of insurance be a building on ground not owned by the assured in fee simple.” In the application the assured stated that she had title by warranty deed. It appeared that she was the widow of a deceased person, who, by his will, devised the land on which the building insured was situated “to have and to hold until August 1, 1894, provided, if she should marry before that date, then she should take her dower,” etc. *It was held*, that the assured did not have the interest required by the policy, and that the insurance was void. *Dwelling House Ins. Co. v. Dordall,*

33

Responsibility for Neglect of Appraisers.—Where, under a policy of insurance containing a provision that in the event of a disagreement as to the amount of a loss, it should be ascertained by two disinterested appraisers, and a loss occurring, the parties being unable to agree, each selected an appraiser under the conditions of the policy to make an estimate for them, who entered upon the discharge of their duties, but were unable to agree, and having failed to appoint an umpire, the proceedings were abandoned, *it was held* that the responsibility of the case was upon the party represented by the appraiser who neglected his duty. *Niagara Ins. Co. v. Bishop,*

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Sixty Days Limitation.—A clause in a policy of insurance, providing that no loss shall become payable until sixty days after the making of the appraiser's award, where an appraisal is required under the terms of the policy, is a legal limitation, and a compliance therewith is a condition precedent to the bringing of the suit upon the policy. *Niagara Ins. Co. v. Bishop,*

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INTOXICATING LIQUORS.

Extract of Lemon.—An article generally and properly known and used for culinary purposes, recognized, and a formula prescribed for its preparation, as such, in standard dispensaries, prior to the enactment of the dram shop act, and not then known and classified among liquors used as a beverage, is not to be deemed an intoxicating liquor within the meaning of this enactment, simply because it contains alcohol, and may, or in fact, does, produce intoxication.

Helcomb v. The People. etc.,

73

JOINT ACTIONS.

Municipalities and Municipal Officers.—Where an action for a tort was brought against the several defendants, and in legal con-

JOINT ACTIONS. *Continued.*

temptation the act complained of could not have been committed by several persons and could only be considered the tort of the actual misdoer or the distinct tort of each, a separate action against the actual misdoers only or against each must be brought. *So held*, where an action was brought against a city and a city marshal jointly for arresting and confining the plaintiff in the calaboose. *Blake v. City of Pontiac*, 544

JUDGMENT BY CONFESSION.

As of a Term.—A judgment by confession “as of a term” can only be entered in term time; the expression “as of any term,” when applied to entering a judgment by confession, can only mean at any term. *Graves, Exr., etc. v. Whitney*, 435

Authority to Confess.—It is a rule firmly established, that the authority to confess judgment, without process, must be clearly given and strictly pursued. *Graves v. Whitney*, 435

Warrant of Authority—Vacation and Term Time.—Warrant of attorney authorizing any attorney in any court of record within the United States, to appear and confess judgment upon a promissory note against the maker, as of any term, for the amount of the note, costs of suit and attorney’s commission, etc., does not authorize the confession of the judgment in vacation, and a judgment entered in vacation under it is void. *Graves v. Whitney*, 435

When Void.—Where a judgment has been entered by confession upon a *cognovit* and is void, the court should, upon motion, vacate it and leave the party plaintiff to pursue the ordinary remedy by an action at law. *Graves v. Whitney*, 435

JUDGMENTS.

Functions of the Judgment.—It is not a function of the judgment to show what evidence the court acted upon; if a party wishes the court trying the issues without a jury, to show what disposal was made of his defense, or to disclose the factors which enter into the findings, he may do so by properly framed propositions of law which the court is required to mark “held” or “refused.” *Coats v. Barrett*, 275

Requisites of.—The judgment of the court is giving the answer to the problem before it, and not the process by which the answer has been obtained. *Coats v. Barrett*, 275

Sufficiency of Form.—A judgment in the following form, “The court being fully advised in the matter, finds the issues for the plaintiff, and proceeds to render judgment in favor of the said plaintiff, and against the said defendant, for the sum of two hundred and forty-seven dollars and seventy cents and the costs of this suit, and execution is awarded for the same,” while not in the most approved form, yet when tested by the rules of law, is not fatally defective. *Coats v. Barrett*, 275

Test for Determining the Sufficiency.—Whatever appears upon its face to be intended as the entry of a judgment, will be regarded as sufficiently formal if it shows (1) the relief granted, and (2)

JUDGMENTS. *Continued.*

that the grant was made by the court in whose record the entry was written. In specifying the relief granted, the parties of whom and for whom it is given must be sufficiently identified. It must show the plaintiff who recovers, the defendant, against whom the recovery is had, and the specified thing or amount of money recovered. *Coats v. Barrett*, 275

JUDICIAL SALES.

Payment to Purchaser, When a Redemption.—A payment by the owner of the equity to the purchaser, of the amount of his bid and interest, and taking the assignment of the certificate of purchase, is not a redemption as required by statute, and will not prevent a judgment creditor from redeeming under the statute. *Boynton v. Pierce*, 497

JURISDICTION.

Accounting for Proceeds, etc.—Equity has no jurisdiction to decree an accounting of the proceeds of the income of real estate and personal property alleged to have belonged to a deceased person in his lifetime, and received by a person acting in the capacity of an ordinary agent transacting the business of his principal, collecting and receiving money for him. *Duval v. Duval*, 470

County Courts—Probate Matters.—County Courts have jurisdiction to hear and determine all matters of claims of the estates of deceased persons against all persons. The fact that the deceased person was a woman, and the claim is against her husband, who is administrator of her estate, can make no difference. The County Court had full power to compel him to account. *Duval v. Duval*, 470

Right to Question Waived by Answering.—Where a court of chancery obtains jurisdiction of the parties, and the subject-matter of a controversy, involving, incidentally, matters of account between the parties, there is no necessity in litigating the accounts by piecemeal. In such cases a party, answering generally, waives his right to question the jurisdiction of the court to state the account. *Herrick v. Lynch*, 657

JUROR.

Improper Conduct.—An affidavit based upon information and belief, is insufficient to support an objection to a verdict on the ground that the jury arrived at their finding by setting down on separate pieces of paper the amount each juror was willing to allow, and dividing the aggregate by twelve. *Youle v. Brown*, 102

JURY.

Disregarding Instructions.—Where a jury disregards the instructions of the court, their verdict may be set aside and a new trial granted. *Becker v. Schiller*, 606

Findings, When not to be Set Aside.—Where the findings of a jury do not appear to be manifestly against the evidence or to have resulted from passion or prejudice, the verdict will not be set aside. *E. St. L. Con. Ry. Co. v. O'Hara*, 228

JURY. Continued.

Province to Reconcile Conflicting Evidence.—It is the province of the jury to reconcile conflicting evidence, and settle doubtful questions of fact. The Appellate Court will not disturb a finding, unless the verdict is so clearly against the evidence as to be considered the result of passion, prejudice or a palpable misapprehension of the facts. *Colley v. Harding*, 605

LANDLORD AND TENANT.

Consideration for a New Lease.—Where a tenant is holding under an unexpired lease, an agreement to remain after its expiration and pay rent, will be a good consideration for a new lease, and it will not be necessary for him to formally vacate the premises and re-enter under the new lease. The law requires no such useless ceremony. *Goldsbrough v. Gable*, 554

Denial of the Execution of the Lease.—The execution of a lease can not be denied without a sworn plea denying the execution thereof. *Tucker v. Burkitt*, 278

Hold Over—Presumption.—Where a tenant remains in the possession of premises after the expiration of his term, the presumption of law is, in the absence of anything to show to the contrary, that he is satisfied with the terms of his lease, and intends to create a tenancy for the future upon the same conditions, and when the landlord accepts rent at the old rate, a similar presumption arises as to him. *Goldsbrough v. Gable*, 554

Holding Over Pending Negotiations for a New Lease.—Where a tenant is holding over, after the expiration of his term, upon a new tenancy, in pursuance of an agreement with his landlord for a reduction of the rent, the payment and acceptance of the rent at the old rate, while negotiations are pending for a new lease, will not abrogate the agreement and restore the terms of the expired lease, or be conclusive of the intention to continue payment of rent at the old rate. Such an agreement to reduce the rent is a sufficient consideration for new tenancy. *Goldsbrough v. Gable*, 554

Presumption from Holding Over.—Where a tenant is holding over after the expiration of his lease, the presumption that he intends to create a new tenancy, is not one that the court is compelled to draw from the fact of the holding over, if the evidence shows that the intention presumed did not, in fact, exist on the part of either landlord or tenant, or if they have agreed differently, the presumption will not avail. *Goldsbrough v. Gable*, 554

Presumption as to Holding Over—Rebuttal.—Where a tenant is holding over after the expiration of his term, the presumption that he intends to create a tenancy for the future upon the same conditions as to him, can not be rebutted by proof of a contrary intention on his part alone, and if the landlord has not assented to its terms, he has a right to insist upon the presumption and exercise his election accordingly. *Goldsbrough v. Gable*, 554

Presumptions as to Holding Over—When Rebutted.—The fact that a tenant refused to remain on the premises upon the same rent provided in his original lease, sufficiently rebuts the implications of

LANDLORD AND TENANT. *Continued.*

an intention on his part to enter upon the new tenancy, and the fact that the landlord agreed, if the tenant would stay, it should be at a rent below the rate fixed by the existing lease, is competent evidence to show that the landlord did not intend to create a new tenancy at the rent provided in the original lease. *Goldsbrough v. Gable*, 554

Right to Contract for Future Tenancy.—The fact that the tenant is holding under a lease which is not yet expired, does not affect his right to create a new tenancy on different terms, after the expiration of his lease, and a verbal agreement for such a tenancy upon any terms to which the parties may agree, if executed, will be effective and binding. *Goldsbrough v. Gable*, 554

LEGATEES.

Gifts to Children.—The law draws a distinction between a gift to such children as shall arrive at legal age and a gift to children to be paid when they arrive at legal age. In the first instance the gift is contingent because it can not be known at the death of the testator, whether a donee will be found at the proper period of time to take, while in the latter instance the donee is known at the time of the testator's death, the gift settled upon him and its payment only deferred. When the donee is known, the gift is said to vest an interest at once, and though such donee does not survive to take possession, his interests and right of possession pass, upon his death, to his legal representatives. When no gift is to be found beyond a mere direction to distribute or divide at a certain stated period or upon the happening of some event, the rule is different. *Kelly et al. v. Gonce et al.*, 82

LEGISLATIVE BODIES.

Records—Amendments.—A legislative body makes and controls its own record and decides for itself when it contains a true history of its proceedings. It may amend its record by the addition of omitted facts so as to make it show the whole truth and correspond with the facts; and this may be done from the personal knowledge of the members of the body. *Village of Gilberts v. Rabe*, 418

LIFE INSURANCE.

Right of Action in the Name of Beneficiaries.—Where a person insured his life for the benefit of his wife, naming her in the policy as the beneficiary, and the policy contained a condition that any member having designated his beneficiary might change the same at his pleasure without notice to or consent of the beneficiary, and that all persons accepting any interest in the policy or company did so upon these express terms, it was held in an action to recover damages for an alleged declaration of forfeiture of the policy, that the wife had no present right of action, either to recover the premiums paid by her husband because they were not paid for her use, or to recover damages for being deprived of an expectancy, because she might be deprived of that by the act of her husband in appointing another beneficiary. *Knights T. & M. Life Indemnity Co. v. Gravett*, 252

LIMITATIONS.

Waiver of Conditions in a Policy—Pleading—Burden of Proof.—When a policy of insurance contains a limitation clause of six months, and the declaration in a suit brought upon it after the expiration of six months averred that the company had waived this clause by requesting the assured not to sue, *it was held*, that under a plea of the general issue, the burden of showing the waiver was upon the plaintiff. *Illinois Live Stock Insurance Co. v. Baker*, 92

Can Not be Revived After a Waiver.—After an insurance company has waived the right to rely upon a clause of limitation contained in its policy, such a waiver can not be recalled or revoked. If any substantial part of the time provided by the limiting clause is lost by reason of the waiver, the limitation is wholly gone. It can not then be revived, nor can the plaintiff be required to sue, within any time short of the statutory limitation. *Illinois Live Stock Insurance Co. v. Baker*, 92

MARRIAGE.

Of Debtor and Creditor.—A woman being indebted to a man for money loaned, married him. He afterward sued her for the money and she pleaded the marriage as a release. *It was held*, in view of the change made by the statute in regard to husband and wife, that marrying her creditor did not discharge the debt. *Catharine Clark v. Turner A. Clark*, 163

MARRIED WOMEN.

Statutory Rights.—The act of March 30, 1874, to revise the law in relation to husband and wife, abolished the common law rule of the husband's liability and freed the wife from the disabilities and the husband from the liabilities imposed by the common law. *Catharine Clark v. Turner A. Clark*, 163

MARRIED WOMEN'S ACT.

Effect on the Common Law.—The act to protect married women in their separate property, approved February 21, 1861, did not abrogate the common law rule of the husband's liability, because it still left to him the wife's earnings; but the act of March 24, 1869, in relation to the earnings of married women, by divesting him of that right, swept away the last vestige of the reasons upon which the rule rested, and therefore the rule itself must cease. *Catharine Clark v. Turner A. Clark*, 163

Rights and Liabilities—Intermarriage of Debtor and Creditor as a Release.—Under the common law a husband could not sue his wife, because they were one, nor could she be indebted to him because she had no power to contract with him during coverture, and all her indebtedness, to whomsoever contracted, by the marriage, became chargeable to him. Such indebtedness as to him must have been thereby extinguished since he could not be debtor to himself. *Catharine Clark v. Turner A. Clark*, 163

MASTER AND SERVANT.

Duty in Regard to Incompetent or Habitually Negligent Servants.

MASTER AND SERVANT. *Continued.*

An employer is not to knowingly employ or retain incompetent or habitually negligent servants, and when one servant is injured by the negligence of his fellow-servant, who is incompetent or habitually negligent, of which the master has knowledge, and of which the servant has no notice, the master is liable. *St. L., A. & T. H. R. R. Co. v. Corgan*, 229

Duty of Servants Entering upon Employment.—A servant, entering upon an employment, assumes such risks as are usually incident to such employment. He is not bound to investigate or ascertain whether the common master has used reasonable care in the selection of those already employed, and with whom he is to perform his duties. *St. L., A. & T. H. R. R. Co. v. Corgan*, 229

Employment of Incompetent Servants—Notice to Employer.—An employe is warranted in assuming that his employer has discharged his duty in using reasonable care and caution in employing those with whom he is to work, and where he finds any of his fellow-servants incompetent, so that his position is extra hazardous, it is his duty to notify his employer, and if the latter, when so notified, fails to discharge the incompetent servants, unless the employe quits the employment, he will be deemed to have assumed the extra hazardous position. *St. Louis, A. & T. H. R. R. Co. v. Corgan*, 229

Incompetent Employes—Burden of Proof.—In an action to recover for personal injuries resulting from an incompetent or habitually negligent servant, the burden of proving notice to the master retaining such servant is upon the plaintiff. *St. Louis, A. & T. H. R. R. Co. v. Corgan*, 229

Duty to Procure Safe Machinery.—To require that machinery shall be free from doubt, in respect to safety in use, is equivalent to requiring that it shall be perfectly safe. It is a matter of common knowledge that machinery, generally, is not absolutely safe in use, and there is no requirement in law that an employer shall furnish such machinery. *Illinois River Paper Co. v. Albert*, 363

Master's Liability for Acts of the Servant.—An accident resulting in personal injuries was due to the improper management of persons operating an aerial railway, who were in the employ of the proprietor, but for an entirely different purpose—that of running a steamer as pilot and engineer, and had no authority or right to operate the railway. It appeared that the injured party wanted to ride, but was told that the railway was not running that day. He insisted on taking a ride, and the engineer said he guessed that they could run it; so they tied up the steamer and made the attempt, resulting in the accident in question. *It was held*, that no authority in the engineer and pilot to leave the steamer and undertake the operating of the railway, could be fairly implied from the nature of their employment. *Biederman v. Brown*, 483

MATERIAL ALTERATIONS.

A Question for the Court—Instructions.—In an action upon a bond, the defense was that of material alterations, and there was a

MATERIAL ALTERATIONS. *Continued.*

conflict of evidence on trial. An instruction which informed the jury that if the bond sued upon had been altered in a material point by the principal obligor, after the same had been signed by his sureties, and without their knowledge and consent, then such bond would cease to be binding upon the sureties unless afterward ratified by them, is erroneous, because it makes the jury the judges of what constitutes a material alteration of the bond. *Donnell Mfg. Co. v. Jones,* 327

MEASURE OF DAMAGES.

Board of Trade Prices.—The price of the commodity on the Chicago Board of Trade, does not always represent its true market value. Often prices there are exaggerated as well as depressed by the most dishonest and unfair means. *Hogan v. Donohue,* 432

Market Price of a Commodity.—Where the market price of a commodity is in issue, and no market price at the place of delivery has been established by the usual mode of trade, it is competent to hear proof of prices in adjacent and controlling markets. *Hogan v. Donohue,* 432

Market Price of Grain.—In an action between the vendor and vendee for the price of corn, it was contended upon one hand that the market price, at the place of delivery, could be controlled by the Board of Trade at Chicago, less the cost of transportation, etc; on the other hand, the contrary was contended. An offer was made to prove that the grain was cornered on the Board of Trade on that day, and that before the prices there prevailing could be obtained, it must be inspected in an elevator in Chicago, a warehouse receipt issued and duly registered. *It was held,* that the proof offered was competent and that the court erred in refusing it. *Hogan et al. v. Donohue,* 432

MECHANICS' LIENS.

Chancery Jurisdiction—Proceeding to Foreclose Not a Chancery Proceeding.—The act of the legislature approved April 25, 1873, providing that in all cases where chancery jurisdiction has been conferred upon County Courts by special enactment, and such chancery jurisdiction has been repealed or has ceased to exist by virtue of the act in force July 1, 1872, all causes pending, together with the records, files and papers pertaining to such chancery jurisdiction, shall be transferred to the Circuit Courts, does not contemplate statutory proceeding to enforce a mechanic's lien. *Boynton v. Holcomb,* 503

Effect of the Sale Under a Decree of Foreclosure.—Proceedings in foreclosure under the mechanics' lien law, do not bar the right of judgment creditors to redeem the premises from the master's sale in such proceedings. Such creditors may redeem after the expiration of the twelve months allowed by the owner of the equity, and will not remit them to the fund resulting from a sale of real estate under the foreclosure of the lien. *Boynton v. Pierce,* 497

Repealing Statutes—Saving Clause.—Where a decree for a mechanics' lien was rendered, and afterward, and before any further

MECHANICS' LIENS. *Continued.*

proceedings were had thereunder, the act of the legislature went into effect repealing the law under which the decree was rendered, and without any saving clause, as to the proceedings begun and pending under the repealed law, *it was held*, that a sale by a master under the decree, was unauthorized and void. By the repealing act, all right to proceed under the decree was taken away. *Boynston v. Holcomb et al.*, 503

MERGER.

Conveyance by Mortgagor to Mortgagee—Exception.—The general presumption of law when the owner of the greater interest in real estate conveys to the holder of the lesser interest, is that the title merges in the grantee, and in case of the grantee holding a mortgage and the grantor of the equity of redemption being a mortgagor, the legal presumption is that the mortgage debt is satisfied by the conveyance, and the grantee paid in full by the execution of the deed; but this presumption has many exceptions, especially where such a merger is detrimental to the holder of the mortgage. *Mann v. Mann*, 472

MISJOINDER OF PARTIES.

Plaintiff.—Where a person brought a joint action of trespass on the case, to recover damages against an insurance company for an alleged fraudulent declaration of forfeiture of a policy of insurance on his life in his own name, and that of his wife, the beneficiary named in the policy, *it was held*, that there was a misjoinder of parties plaintiff, and a judgment recovered by them was reversed. *Knights Templar & Masons' Life Indemnity Co. v. Gravett*, 252

MISREPRESENTATIONS.

The fact that officers, who had been in the pursuit of a criminal for whom a reward was offered, falsely stated to a local officer, whom they employed to arrest the criminal, the crime for which he was to be arrested, and did not tell his true name, is no reason why the local officer making the arrest should be entitled to share in the reward. *Mahoney v. Whyte*, 97

MOTION.

Right to Make—Waiver.—Where an executor made a motion to vacate a judgment, entered against his testator in vacation, and did not file his letters testamentary until the term subsequent to entering the motion, and it being objected that he had no right to make the motion, *it was held* that the objection was waived by contesting the motion upon its merits. *Graves v. Whitney*, 435

MUTUAL BENEFIT ASSOCIATIONS.

Certificates Providing a Remedy in Equity--The Remedy at Law. Where a certificate in a mutual benefit association provided that the application for membership and the certificate should constitute the complete and only contract between the holder of the certificate and the association, and that no suit or proceeding should be brought upon such contract except in equity, *it was held* that this clause in the certificate providing for a specific remedy in equity was based

MUTUAL BENEFIT ASSOCIATIONS. *Continued.*

upon the theory that an assessment would be necessary and collectible. Where, by the action of the association, the situation was so changed that it would have no right to make an assessment in payment of the certificate sued on, because by reason of a surplus none was necessary, this condition was abrogated, and the beneficiaries were remitted to the appropriate remedy at law. *Covenant Mutual Benefit Ass'n v. Baldwin*, 203

Pleading Statutory Exemptions—Jurisdiction.—A plea by a mutual benefit association, based upon the theory that the action was not brought in the proper county, must state facts sufficient to show that it is not subject to the provisions of the law, providing that actions against insurance companies wherein an individual is plaintiff, may be brought in the county where the plaintiff resides. *Covenant Mutual Benefit Ass'n v. Baldwin*, 203

NEGLIGENCE.

Danger Known and Obvious.—Where dangers are known and obvious, if a person voluntarily incurs them, he can not recover for injuries suffered in consequence, for this would amount to compensating him for his own negligence. *Illinois River Paper Co. v. Albert*, 363

Defective Sidewalk.—On the trial of an action against a municipal corporation for damages, sustained by reason of a defective sidewalk, it is error to permit the introduction of evidence on the part of the plaintiff, showing the condition of the walk at other places than that at which the injury occurred. *City of Streator v. Hamilton*, 449

Defective Sidewalk—Burden of Proof.—In an action for the recovery of damages, sustained by reason of a defective sidewalk, it is necessary to the recovery for the plaintiff to prove that the proximate cause of the accident and consequent injury was the failure of duty on the part of the municipal corporation to keep its sidewalks in a reasonably safe condition. *City of Streator v. Hamilton*, 449

Defective Sidewalk—Subsequent Repairs.—On the trial of an action for personal injuries, resulting from a defective sidewalk, it is error to permit the admission of evidence showing that repairs were made on the sidewalk after the occurrence of the accident. *City of Streator v. Hamilton*, 449

Knowledge of the Use of the Track by Person Passing Along or Across it.—The fact that many persons use a railroad track in passing along or across it with the knowledge of the company, but without the legal right to do so, may have an important bearing upon the question as to the correctness of the act of the railroad in the operation of its trains resulting in an injury, in this: such an act may be mere negligence without such knowledge, for which there could be no recovery; but with such knowledge, the same act may be so grossly negligent as to evince wantonness indicating an utter disregard for life. *Illinois Central R. R. Co. v. Beard*, 232

Use of Ordinary Care.—The degree of care used by a person in passing along a defective sidewalk and avoiding obstructions therein, is a question for the jury. *Town of Normal v. Gresham*, 196

NEGLIGENCE. *Continued.*

Walking upon a Railroad Track.—It is negligence for a person to walk upon a railroad track, whether laid in a street or upon an open field, and he who deliberately does so, will be presumed to assume the risk of the perils he may encounter. *I. C. R. R. v. Beard*, 232

What Amounts to Willful or Wanton Negligence.—The running of a locomotive in the night at an unlawful rate of speed, without signaling or without lights, along a track within the limits of a city at a place where many people were in the habit of crossing, is negligence so gross that it amounts to willful or wanton negligence, and as such will authorize a recovery, whether the place at which the injury was inflicted was a public street or the railroad right of way. *E. St. L. Con. Ry. Co. v. O'Hara*, 282

Willful Negligence—Violation of City Ordinance.—The willful disregard by a railroad company, or its agents or employes, of the duty imposed by an ordinance of a city regulating the speed of trains and the manner of moving them at night within the city limits, when sufficiently pleaded and in evidence before a jury, will warrant a special finding that the railroad company is guilty of willful negligence. *E. St. L. Con. Ry. Co. v. O'Hara*, 282

NEW TRIALS.

Newly Discovered Evidence.—When the newly discovered evidence relied upon in support of a motion for a new trial is cumulative, and not conclusive, it will not furnish ground for a new trial. *Biederman v. Brown*, 483

NON-SUIT.

Misjoinder of Plaintiffs.—The joinder of too many plaintiffs in an action *ex delicto*, is ground for a non-suit on the trial. In this respect actions on contracts and for torts are alike. *Knights Templar & Masons' Life Indemnity Co. v. Gravett*, 252

NOTICE.

Cities and Villages—Negligence—Notice to Policemen.—Where the police of a city are charged with the duty of entering in a record, kept at the police station, all defects found by them in sidewalks upon their beats, and are in the habit of doing so as a part of their duties to the city, *it was held*, that notice to one of their number, of a defect in the sidewalk, is notice to the city, and the fact that such officer is a policeman, will not affect the question. *Looney v. The City of Joliet*, 621

Of Defects in Sidewalks—When Inferred.—A city, having actual notice of the building of a sidewalk, will be held to know how long it has been built, and of its tendency to decay. Reasonable prudence requires that a wooden sidewalk, which has been built eight or nine years, should be examined occasionally, to see if it is in a safe condition, and if it appears that such an examination would have disclosed defects, a jury may reasonably infer notice, even when no actual notice is shown. *City of Joliet v. Kate McCraney*, 381

Defects in Sidewalks.—The superintendent of streets in a city was informed that a sidewalk was in an unsafe condition by one of his

NOTICE. Continued.

assistants a short time before the occurrence of an accident resulting in an injury, and in ample time to have repaired it. *It was held, that the notice to the city was sufficient. City of Joliet v. McCraney,* 381

Defective Sidewalks.—Notice of the condition of a sidewalk to an officer or agent of the city, not charged with any duty respecting it, and who is not the representative of the city concerning any matter of that kind, will not constitute actual notice to the city; but if the officer receiving the notice is charged with a duty to act concerning the defect, and to set in motion the agencies for its repair, notice to him is notice to the city. *Looney v. City of Joliet,* 621

To an Agent, Notice to His Principal.—Notice to an agent of a fact within the scope of his agency is notice to his principal, yet such notice does not extend beyond the transaction covered by the agency. *Webber v. Indiana Nat. Bk.,* 336

To Agent, Notice to Principal.—It is a principle of law that the principal is held to the notice acquired by his agent for all facts coming to the knowledge of such agent in the course of his employment. *Mann v. Reed,* 406

To an Employer—When Unnecessary.—In an action for injuries, based upon an improper construction of machinery, a notice to the owner, etc., is not necessary, but it is otherwise in cases of a defect occasioned by use, or for want of repair. *C., C. & St. L. Ry. Co. v. Dixon,* 292

NOTICE TO QUIT.

Where a person in possession of land claims to hold the same adversely, or where he claims by a title inconsistent with the relations of landlord and tenant, no notice to quit is necessary before bringing a suit to oust him from the possession. *Shepardson v. McDole,* 350

ORDINANCE.

Void in Part, Void in All.—A city ordinance enacted that “any person who shall, within the limits of said city, without procuring a license therefor, carry on the trade, business or occupation of (among others) peddler, shall on conviction thereof, forfeit to said city not less than \$5 nor more than \$200 for each offense,” with a proviso “that no license shall be required for the selling of any articles manufactured and sold by *bona fide* residents of said city, or that are exempt from license by the statute of the State of Illinois, or for orders and sales at wholesale.” It was conceded that the proviso was void, but contended that the proviso might be rejected and the rest of the ordinance upheld as valid. It was held that the proviso was so connected with the preceding portion of the ordinance, as a condition, consideration or compensation for it, as to warrant the conclusion that the parts were intended as a whole and that one part would not have been adopted without the other and that the ordinance is void. *Lucas v. City of Macomb,* 60

PARENT AND CHILD.

Parent's Liability.—Where a child resides away from home with-

PARENT AND CHILD. *Continued.*

out the consent of its parent, in order to hold the parent for goods furnished, an express promise must be proven or the facts and circumstances must be such that a promise can be inferred. *Miller v. Davis & McKinney*, 377

PARTIES.

Of Two Innocent Parties, Who Must Suffer.—In a case where one of two innocent parties must suffer by the fraud or deceit of another, the loss should fall on him who put his trust and confidence in the deceiver. *Donnell Mfg. Co. v. Jones*, 327

PARTIES LITIGANT.

Actions Under the Dram Shop Act.—An action under Sec. 9 of Chap. 43, R. S., commonly called the Dram Shop Act, was brought against two defendants jointly. The declaration charged one of the defendants with the sale of the liquors in question, and in order to fix the liability of the other, it was charged that the building in which the liquors were sold, was the joint property of both, and jointly occupied by them, and that both knowingly permitted the premises so occupied by them to be used and occupied for the sale of intoxicating liquors therein. *It was held*, that the declaration was good as to both. *Helmuth v. Bell*, 626

Minors by Their Next Friend or Guardian.—The objection that the suit was improperly brought by minors in not suing by their next friend or guardian, can not be taken advantage of for the first time in the Appellate Court. The objection should have been raised in the court below before the trial. *Helmuth v. Bell*, 626

Misjoinder of Plaintiffs.—A misjoinder of parties plaintiff should be taken advantage of by demurrer, plea in abatement, or at least by a motion in arrest of judgment in the trial court; it comes too late when made for the first time upon error in the Appellate Court. *Helmuth v. Bell*, 626

PAYMENT.

A payment is the discharge, in money, of a sum due, and it can only be made in money, or that which the creditor accepts as money, or in lieu of it. *Scott v. Gilkey*, 116

By Delegation.—The payee left a note in a bank for collection and the maker took it up by giving his note for the amount. The bank having failed, the payee brought suit against the maker. *It was held*, that had there been an actual transfer of the money belonging to him in the bank, as would have been acknowledgment by the bank that it had received the amount from the maker, then under the authority the bank had to receive payment in money, it would have been a payment by delegation. *Scott v. Gilkey*, 116

Authority of an Agent to Accept Anything but Money as a Payment.—An agent having for collection a promissory note, or other money demand, can not rightfully accept anything but money as payment, without express authority from his principal. *Scott v. Gilkey*, 116

Authority to Receive Payment.—The fact that notes made pay-

PAYMENT. *Continued.*

able at a bank are placed there by the payee, and there found by the maker, without any notice that they were not left there for collection, is sufficient to show an authority to receive payment, and to justify the maker in paying. *Scott v. Gilkey*, 116

By Note—Inference of Discharge.—Where it is claimed by a debtor that a promissory note has been given in discharge of the obligation of a contract, the burden of the proof is upon him to show that the note was both given and received as an absolute payment, except in cases where the evidence raises a positive inference of discharge.

Hercules Iron Works v. Hummer, 598

Note Left for Collection—Authority to Accept Another Note in Payment.—If a maker takes up his note left in a bank for collection, by giving to the banker his note for the amount, he does so at his own risk of the banker's failure to pay the amount over to the payee of the note so taken up, unless the bank's action is really and *bona fide* a loan, the money being in hand subject to the proposed appropriation and actually transferred to the creditor's account, and the burden of proving these facts as between the creditor and the debtor is upon the latter. *Scott v. Gilkey*, 116

Promissory Note—When.—It has been held in several of the States that the giving of a negotiable note in consideration of a simple contract debt, discharges the contract on which the debt is founded, but the decided weight of authority in this country and England is to the contrary. To have that effect, it must be agreed that the note shall be taken in absolute payment, or that the creditor has so parted with the note as to subject the debtor to double payment.

The Hercules Iron Works v. Hummer, 598

PLATS AND REPORTS.

Of Survey—Admissibility in Evidence.—When a person is appointed under Sec. 2 of Chap. 94, entitled "An Act to Revise the Law in Relation to Mines," by the court, to make examinations and surveys for the purpose of ascertaining whether the mine is being worked upon the land of an adjacent owner, the plat, without proof of its correctness, much less a report of the survey or of what he may choose to state in it, is not admissible in evidence. *Monmouth Mining & Mfg. Co. v. Regmier*, 885

PLEADING.

Allegations of Time and Place.—In an action against a railroad company for violation of the statute requiring the engineer or fireman of any locomotive engine to ring a bell or sound a whistle before crossing a public highway, a declaration containing four counts, charging in substantially the same terms, several violations of the statute, and stating the time of the violations as November 30, 1892, and the place, the intersection of defendant's road and the public highway at or near the southwest corner of section five, the southeast corner of section six, and the northeast corner of section seven, and the northwest corner of section eight, in township three, range thirteen west, in Lawrence county, is sufficiently certain, so

PLEADING. *Continued.*

far as allegations of time and place are concerned. *Ohio & Mississippi Ry. Co. v. People, etc.*, 225

Allegations Not Sustained.—An allegation in a declaration, that the superintendent of a mill wrongfully directed and commanded the plaintiff to belt a pulley on a shaft while a friction clutch pulley on the same shaft was in rapid motion, without shutting down the mill, and that the plaintiff was not guilty of any negligence in obeying the command, is not sustained where the proofs show that the plaintiff voluntarily undertook to belt the pulley himself, without any direction or suggestion of the superintendent tending to deprive him of the free exercise of his judgment, or cause him to encounter a risk which he was otherwise unwilling to assume. *Illinois River Paper Co. v. Albert*, 363

Consideration—Burden of Proof.—Where a promise sued on is conditioned upon an event not certain to happen, it is not negotiable and does not import a consideration. A special plea under the statute is not necessary to make the want of a consideration available as a defense. Under the general issue the burden of proving a consideration is upon the plaintiff. *B. S. Green Co. v. Blodgett*, 180

In Criminal Cases.—Where a defendant is arraigned and “stands mute” it is the duty of the court to enter for him a plea of not guilty. *McDonald v. The People*, 357

Demurrer.—Where the declaration in a suit upon a policy of insurance containing a clause limiting the bringing of suits upon it to six months, avers by proper allegations, that the company had waived the clause, a plea of the statute of limitations founded upon this clause pleaded after the general issue, is bad as amounting only to the general issue. *Illinois Live Stock Ins. Co. v. Baker*, 92

Demurrer to Special Pleas.—It is not error to sustain a demurrer to a special plea, where the whole question can be litigated under the general issue, and all the evidence that could have been introduced under the special plea, was admitted in evidence under the general issue, and the case fully considered under the facts by the court. *Lyon v. Worcester*, 639

Fraud and Circumvention.—A plea which attempts to set up fraud and circumvention in the execution of an instrument in writing and the alleged false representations and fraud relied upon did not relate to the execution of the instrument, but solely to the consideration that moved the defendant to enter into it, is bad. The defense sought to be interposed by such a plea can only be sustained by fraud or circumvention in the execution of the instrument and not by proof of a failing, partial or total, of the consideration. *Coddington v. Hoblit*, 66

Liability for the Wrongful Acts of Lessees.—Under proper pleadings a person may be made liable if he leases premises with a coal washer built upon them in such a way that its operation may inflict injury upon the premises of another, such leasing being made with the knowledge that it would be used by the tenant and results

PLEADING. *Continued.*

would naturally follow the proper use of it, the injury in such a case being the result of the prosecution of the business for the continuance of which the lessor would receive rent as a consideration.

Coal Run Coal Co. v. Giles, 585

Riens Per Descent.—Under the Statute of Frauds and Perjuries, a plea of *riens per descent* by an heir and devisee, in an action of covenant, which fails to negative the charge in the declaration that there were lands devised to him, though sufficient at common law, where the action could be maintained only against the heir who received land from the ancestor by descent, is not sufficient under Secs. 12 and 13, of Chap. 59, R. S., entitled "Frauds and Perjuries."

Dickison v. Garland, 578

Sufficiency of Assets to Pay Claims, etc.—A plea of sufficient assets in the hands of the executor to pay the debts, by an heir and legatee of the deceased person, to an action brought against him for a breach of a covenant for title in a deed of real property, executed by his deceased ancestors and delivered to the plaintiff in the suit, which simply shows that after paying all debts, legacies, and expenses of administration, there remained in the hands of the executor \$6,000, which might have been applied to the payment of claims sued on, is not a sufficient plea, where the claim in suit did not accrue until the plaintiff had been evicted from the property, causing the damages sought to be recovered, and after the estate had been settled and the assets distributed. *Dickison v. Garland,* 578

Sufficiency of Declaration.—In an action against a city for erecting a water tower near the plaintiff's premises, a declaration which charged that the tower was dangerous and liable to fall, but did not show by proper averments any negligence or improper construction of it, or even a weakness of it, or that there was any defect in the material out of which it was constructed, or why it was likely to fall, is insufficient, and a demurrer to it was held to have been properly sustained. *Barrows v. The City of Sycamore,* 590

Sufficiency of Declaration—Debt on Penal Statute.—In an action against a railroad company, for a violation of the statute requiring a bell to be rung or a whistle sounded before crossing a public highway, it is not necessary to allege in the declaration any description of the engine or train referred to, or to state whether it was a freight or passenger train, or at what time of the day or night the alleged train or engine passed over the crossing in question, or in which direction it was running along the line of defendant's railway. *O. & M. Ry. Co. v. The People,* 225

A Waiver.—It is not necessary for the plaintiff to aver in his declaration upon a policy of insurance a waiver of the limitation; he may wait for the defendant to set up his matter by a special plea and then reply a waiver by the company. *Illinois Live Stock Ins. Co. v. Baker,* 42

What is a Sufficient Release.—A plea which in substance avers that in his lifetime the deceased (being an employe of a railroad company) made application for insurance in a branch of the company

PLEADING. *Continued.*

called its "relief department" and was accepted as a member, and received a certificate of membership entitling his widow, as a beneficiary, to receive a sum of money in case of his death, and that it was provided in his application for such membership that the acceptance from such department by his beneficiary should operate as a release of all claims for damages which could be made by his heirs, executors or administrators, that after the death of the said employee it paid to his widow as such beneficiary the sum named in the certificate, which she accepted, and the company became thereby released from all claim for damages of the legal representatives of the deceased, etc., is bad for the reason that the said deceased had no power to release the company from payment of damages to his widow and next of kin in case of his death by neglect or default of the company. *Maney v. C., B. & Q. R. R. Co.*, 105

PLEAS AND PROOFS.

Variances.—Under a declaration upon a promissory note alleged to have been executed by the defendant, and one J. H. S. to one H. E., and to have been assigned by H. E. to the plaintiff, a promissory note which does not appear to have been assigned by H. E., as alleged, is not admissible. *Dunker v. Schlotfeldt*, 52

POWERS.

Of President—Implied Agency—Ultra Vires.—The president of a corporation affixed the corporate name to the following instrument: "We, the undersigned, agree to pay to Charles H. Blodgett, or order, the sums set opposite our respective names, within thirty days after lots nine (9), sixteen (16), seventeen (17), eighteen (18) and nineteen (19), proprietor's subdivision of lots one (1) to six (6), original town (now city) of Bloomington, in McLean county, Illinois, are definitely accepted as a site for the postoffice building. If not paid when due, the sums subscribed to bear eight per cent per annum, from the time when due. B. S. Green & Co., one thousand dollars (\$1,000), without interest." It did not appear what the business of the corporation was, but the court said in passing upon it: "We can hardly conceive of any legitimate business, individual, partnership or corporate, to which it would pertain. *It was held*, not to be in any proper sense an act of business, but a simple, single, speculative venture, and therefore beyond the scope of an implied agency and not binding upon the corporation. *B. S. Green Co. v. Blodgett*, 180

PRACTICE.

Abiding by a Plea—Writ of Inquiry.—In an action against the devisees and heirs of a deceased person upon a covenant for title in a deed of real property executed by the common ancestor, the defendants filed pleas of *riens per descent*, of *plene administravit* and of sufficient assets in the hands of the executor, to which demurrers were sustained and the defendants abided by their pleas. *It was held*, that the court would have been justified in giving judgment against the defendants without any writ of inquiry of the lands, tenements or hereditaments, or rents and profits out of the same—de-

PRACTICE. *Continued.*

scended or devised, under Sec. 13 of Chap. 59, R. S., entitled "Frauds and Perjuries." *Dickison v. Garland*, 578

Admission of Evidence in Trials by the Court.—Less importance is attached to the improper admission of evidence when the cause is tried by the court. In such cases it is usual to receive matters offered in proof more freely than in cases of the trial before a jury. *Niagara Ins. Co. v. Bishop*, 388

Affidavits—Bill of Exceptions.—If a party desires to have affidavits read on the hearing of a motion, made a part of the record, he must preserve them in a bill of exceptions. *Alday v. Kenworthy*, 608

In Appellate Court—Abstract Not in Compliance with the Rules of Court.—The following, purporting to be an abstract of the record viz.:

"ABSTRACT OF RECORD.

Page.

1. Placita. Præcipe.
2. Summons, service and return.
- 3-6. Declaration in assumpsit.
7. Motion to rule plaintiff to a bond for costs.
8. Bond for costs.
9. Plea of statute of limitations.
10. Replication to plea.
11. Demurrer to replication.
12. Answer to demurrer.
- 13-14. Bill of exceptions.
- 17-19. Appeal bond duly approved.
20. Orders of court and judgment.
- 21-22. Copy of order book.
23. Assignment of error.
25. Certificate of clerk of County Court."

Was held to be a mere index and not to be regarded as an abstract of the record in any sense as required by the rules of the court. *Spain v. Thomas*, 249

Instructions to be Printed in the Abstract.—Where a part only of the instruction given on behalf of the defendants in error, and none of those given on behalf of the plaintiff are printed in the abstract, under the practice in this State, the court may refuse to consider the errors assigned on the instructions. *Webber et al. v. The Indiana National Bank*, 336

Appellate Proceedings—Abstracts.—Where an abstract contains the instructions given at the trial for one party, and does not contain the instructions given, or refused, for the other party, the Appellate Court can not pass upon alleged errors in giving and refusing instructions, because under certain circumstances, error in the instructions on one side may be cured by instructions on the other. *I. C. R. R. Co. v. O'Keefe*, 320

Bill of Exceptions.—The bill of exceptions is a pleading of the appellant; it is also a certificate of the trial judge and a part of the rec-

PRACTICE. *Continued.*

ord, and not subject to contradiction. *Town of Normal v. Gresham*,
196

Effect of Not Denying Facts Alleged.—All facts alleged and not denied by a plea are admitted the same as though a default were taken. *Dickison v. Garland*,
578

Error in Giving and Refusing Instructions.—A party to an action can not have a judgment against him reversed for error in giving or refusing instructions, unless he has made a proper motion for a new trial in the court below, and preserved the ruling of the court thereon, with his exceptions, in the record. *I. C. R. R. Co. v. O'Keefe*
320

Error Must be Made to Appear.—If a litigant allege an error, he must not only make the error appear, but he must show himself in a position to take advantage of it. *E. St. L. Electric St. R. R. Co. v. Cauley*,
810

Exceptions—Directing Motion for New Trial—Rendition of Judgment.—The order overruling a motion for a new trial and the rendition of the judgment on the verdict are separate acts, and the fact that the two orders are in juxtaposition does not make them one and the same. If a party to a suit is displeased because his motion for a new trial is overruled he should except to the decision of the court in overruling it and not to the rendition of the judgment. *East St. Louis Electric Street Railroad Co. v. Cauley*,
810

Exceptions Must be Taken in Apt Time.—The reasons filed in support of a motion for a new trial may allege error in admitting or excluding evidence, and in giving or refusing instructions, but such errors can not be considered by the Appellate Court, unless the record shows that such exceptions to the ruling of the trial court were taken at the time when the evidence was admitted or excluded, or when the instructions were given or refused. *E. St. L. Electric St. R. R. Co. v. Cauley*,
810

Exception to Evidence.—If the party desires to avail himself of the introduction of incompetent evidence, he must object to the same in apt time, and except to the ruling of the court in passing upon his objection. *C. M. & St. P. R. R. Co. v. Kendall*,
898

Objection, Taking Exceptions, etc.—On the trial of an action, at the close of the evidence on the part of one of the litigants, the attorney for the opposite party objected to all the testimony admitted, and took exceptions, etc. *It was held*, that such an action was utterly valueless. A general objection to all the evidence on one side of a case will not be considered. *Tucker v. Burkitt*,
278

Objections to Testimony.—An objection, to be availing, must be made before a question is answered. Or if the answer is not responsive, a motion to strike out must be made at the earliest opportunity. It would be a dangerous practice to permit counsel to allow questions to be answered, either intentionally or negligently, and then to interpose objections in those instances in which the answers are deemed harmful. *Tucker v. Burkitt*,
278

PRACTICE. *Continued.*

Presumptions in Favor of Records.—Where a bill to foreclose a mortgage averred that it was duly executed, etc., the defendants were defaulted, thereby admitting the truth of these averments. The master in chancery, to whom the case was referred, reported it to be a mortgage deed. No exception was taken to his report and a decree followed finding it to be a proper mortgage deed; on error in the Appellate Court there appeared in the record immediately following the master's report, but not attached to or part of it, what purported to be a copy of the mortgage, showing no seals attached to the signatures of the mortgagors. It being assigned as error that the mortgage was void for want of the seals, *it was held*, that the finding of the decree was supported by the averments of the bill. The report of the master, the admission of the defendant, etc., would induce the belief that the omission of the seals from the copy in the transcript was an oversight on the part of the copyist. *Butler v. Meyer*, 176

Offers of Proof—Exclusion of the Jury.—Where offers of proof are to be made, the trial court may exclude the jury and require that such offers be made out of its hearing. *Illinois River Paper Co. v. Albert*, 363

Suits for the Use of Another—Motion to Dismiss.—O. L. made a note payable to T., and T. indorsed to W. for collection. W. brought a suit in the name of T. for his use, and T. moved to dismiss the suit; thereupon, leave was granted by the court to W. to file a bond to indemnify the said T., which was accordingly filed, and the court overruled the motion to dismiss the suit. *It was held*, that as such suit was being prosecuted in the name of T., the payee of the note, and not in the name of W., the assignee, the court correctly decided the motion, so far as the motion is concerned. *Lyon v. Worcester*, 639

Technical Objections.—A party desiring to urge an objection which is purely formal and technical, must do so in the court below. It can not be urged for the first time in the Appellate Court; *so held*, where a party raised the question for the first time in the Appellate Court, that an action could not be maintained by an assignee of a written instrument because it was not assignable. *Coddington v. Hoblit*, 66

Record.—The court will not consider matters not properly appearing in the record. *Butler et al. v. Meyer et al.*, 176

When Errors Assigned Can Not be Considered.—Where an appellant assigned four errors, namely, (1) the court erred in giving improper instructions for appellee; (2) the court erred in refusing to give proper instructions asked by appellant; (3) the court erred in overruling a motion for a new trial; (4) the court erred in rendering judgment for appellee; but the record contained no motion for a new trial, or decision of the court in overruling such motion, and no exception thereto, *it was held*, that, in this state of the record, the court could not consider the errors assigned. *Illinois Central R. Co. v. O'Keefe*, 320

PRESUMPTIONS.

Absence of a Proper Bill of Exceptions.—In absence of such a bill of exceptions as the law requires, the presumptions are all in favor of the verdict and judgment, and the Appellate Court will presume that the evidence was sufficient to support the verdict.

Lindgren v. Swartz,

488

PRINCIPAL AND AGENT.

It is a maxim of natural justice applicable with great force in cases of agency, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the other whose confidence has been misplaced. *McFadden et al. v. Lynn,*

166

PROMISSORY NOTES.

Alteration of Instrument.—In an action upon a promissory note it appeared that it had been detached from another instrument, to wit, an application for insurance. *It was held,* that it formed no part of the instrument, and that its detachment did not render the note void. *Vandervoort v. Rockford Insurance Company,*

457

Assignment—Right to Correct Indorsements.—Where a payee of a promissory note assigned it to another person, and indorsed upon the back of it that he had received from such person full payment, *it was held,* that if, as a matter of fact, he had sold the note to the person named, and the indorsement appearing as a receipt was intended by him as an assignment, there could be no impropriety in his correcting it. It could be treated as an indorsement in blank, and corrected or filled out upon the trial. *Dunker v. Schlotfeldt,*

652

Indorsement and Guaranty.—The following indorsement upon a promissory note, “for value received—guarantee the payment of the within note at maturity,” made by the payee thereof before maturity and prior to the delivery of the note to a third person, operates as an assignment as well as a guaranty, and is enforceable in favor of any legal holder of the note. *McPherson Nat. Bank v. Velde,*

21

Restrictive Indorsements.—The holder of a promissory note made the following indorsement thereon, viz.: “Pay W. H. C., cash or order for collection and return,” and sent it to the bank of which W. H. C. was cashier, for collection. A few days later the holders received from the bank the following, viz.: * * * “We inclose our draft, \$395.97, in payment of coll. No. 8943, on Bonney, sent us July 22. This includes face and interest at 8 per cent, less our charges of \$1. Don’t release chattel mortgage, as we still hold the note unpaid. By mistake our collection clerk left the coll. off the protest list, and it was not protested, but I think the security is ample to pay the obligation.” *It was held,* that the indorsement by the holder to the bank was restrictive, and was for collection merely, but that the action of the bank and the statement in its letter, when assented to by the acquiescence of the holder, amounted to a pur-

PROMISSORY NOTES. *Continued.*

chase of the paper and gave the bank all the rights of a general holder, including the right to enforce the guaranty. The restrictive indorsement may be treated as stricken out and the bank regarded as any other holder under an indorsement in blank. *McPherson National Bank v. Habbe Velde et al., Surviving Partners, etc.*, 21

QUESTIONS OF FACT.

Jury Should Govern.—Where the evidence creates an impression of doubt in the minds of the court the verdict of the jury should govern. *City of Abingdon v. McCrew*, 355

RAILROADS.

Actions for Injuries—Evidence as Consistent with Carelessness, as with Due Care, etc.—In an action for damages for the death of a railroad employe, where the evidence is as consistent with carelessness as with the exercise of due care on the part of the injured person, there is neither proof nor inference to justify a recovery. *C. & A. R. R. Co. v. Crowder*, 154

Liability for Accidents, etc., Confined to Right of Way—Pleading.—In a declaration against a railroad for damages, sustained by a city, by reason of a judgment having been recovered against it for injuries resulting from a defective sidewalk, it was charged that the defect in the sidewalk was within the right of way of the company. In an additional count, the declaration in the suit of the person who recovered the judgment against the city, was set out *in haec verba*, in which was designated the point where he was injured, in the same way, and it was then averred by the city that said walk, upon which said person so received his said injuries, was a crossing, constructed by the company for the use of foot passengers walking on the street to cross its right of way, and was the crossing and approach thereto, of said street in said city, and over said railroad, and that it was then and there the duty of the defendant railroad company to construct and maintain said crossing. *It was held* that the declaration did not show a failure by the company to maintain the crossing, and the approach thereto, but merely to maintain a good sidewalk within the right of way, and construing the plea most strongly against the pleader, the point where the injury occurred was not on the crossing or the approach thereto. It failed to show a neglect of duty on the part of the company, and a demurrer was properly sustained thereto. *City of Bloomington v. I. C. R. R. Co.*, 129

Signals.—The object of the statute in requiring signals to be given when approaching highway or street crossings, is to protect persons or animals about to cross the track, and to obviate the danger of collision at such crossings. The giving of these signals is a statutory duty, the non-performance of which is negligence as a matter of law only when injury results therefrom to persons or animals endeavoring or intending to cross the track of the railroad upon a street or highway. *Maney v. C., B. & Q. R. R. Co.*, 105

Consolidations—Franchise.—Where it appears that from the time

RAILROADS. *Continued.*

the articles of consolidation are filed with the Secretary of State, a railroad company has been in form and as a matter of fact a component part of the consolidated company, and has been in constant operation as a corporation, the effect of the articles of consolidation, is, if authorized, to create a new corporation *de jure*. If the incorporation is irregular, it becomes a corporation *de facto*. In either view a franchise is involved. *City of Belleville v. I. & St. L. R. R. Co.*,

301

Negligence—Construction.—As a question of fact a jury may well consider a frog-like arrangement of a rail, movable by a switch, on a city sidewalk, a faulty construction, and having a space between the fixed rail and the planking sufficient to catch and hold the foot of a person passing over it, culpable negligence. *Toledo, St. L. & K. C. R. R. Co. v. Clark*,

17

Damages by Fires, etc.—When an injury results from fires originating on the right of way of a railroad, and shown to be caused by sparks thrown out by an engine, a *prima facie* case is made for the plaintiff, subject, however, to be rebutted by evidence that the company used a very high degree of care and skill to avoid inflicting the injury, in the construction and operation of its engine. *Toledo, St. L. & K. C. R. R. Co. v. Kingman*,

43

Damage by Fire—Use of Lands, etc.—It is not error to refuse to allow a witness to testify to facts tending to show that a meadow destroyed by fire would produce more profitable crops of corn than of hay. The fact that the land, after the destruction of the meadow by fires, had it been cultivated in corn, would have yielded a crop more valuable than in hay, is a matter entirely irrelevant to the right or amount of recovery. *T., St. L. & K. C. R. R. Co. v. Kingman*,

43

Duty to Maintain Sidewalks, etc.—The duty of a railroad company to maintain a sidewalk, etc., is predicated upon Par. 71, Chap. 114, S. & C. Stat. 1937, providing that at all railroad crossings of highways and streets, railroad corporations shall construct and maintain crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe to persons and property, and is limited to the crossing and the approach thereto within the right of way. There is no obligation imposed upon it to build and maintain a sidewalk beyond the approach to the crossing. The qualifying words, "within their right of way," do not require it to do more than make the crossing and the approach; but if, by reason of the situation, the approach necessarily extends to the limit of the right of way, it must, to that extent, be built by the city. *City of Bloomington v. Illinois Central R. R. Co.*,

129

Expulsion of Passenger—Show of Force.—Where a passenger upon a railroad train is ordered to leave the car he is in by the servants of a railroad company, and does so, his rights, if any he has, remain the same as if he had been expelled by force from the car. *Pullman Palace Car Co. v. Lee*,

75

RAILROADS. *Continued.*

Obligation to Fence.—A station, not in an incorporated city or village, was located in a public highway. There was a platform, and near by were yards, cribs and a grain dump; there was no incorporated town with lots or blocks, and nothing else at the station except a store where tickets were sold. For many years it had been a flag station, and the business was so small that the public accommodation and convenience, presumably, did not require any building or shelter, as none was erected. *It was held* that no conditions existed that would exempt the railroad from the statutory requirement to fence its road. *Iowa Central R. R. Co. v. Gushee,* 609

Obligation to Fence.—Where there was a highway on both sides of a railroad track, and the track is laid in one of them, *it was held*, that such a place is not excepted from the provisions of the statute requiring the railroad company to fence its track, and there is no exemption on account of public interests, because the usefulness of the highways would not be impaired by such fencing, and the public accommodation and convenience in their use did not require that the railroad track should not be fenced. *Iowa Central R. R. Co. v. Gushee,* 609

Omission to Give Signals—When Negligence in Fact.—If a person in the vicinity of, but not intending to use a crossing, may hold a railroad company for injuries caused by a failure to give the signals, the liability must grow out of peculiar facts and circumstances, by reason of which the injured party had a right, in the exercise of ordinary care, to rely upon and wait for the signals, and making the omission to give them, negligence in fact as to him. *Maney v. C., B. & Q. R. R. Co.,* 105

Ordinances Regulating the Speed of, etc.—It is within the province of a city council to enact ordinances prohibiting railroad companies from running their trains at a greater rate of speed than six miles an hour within the limits of the city, and to require them during the night time, and when dark, to have and keep the headlights burning on the front ends of their engines and the bells thereon ringing. for the purpose of indicating and giving notice of the movement of their locomotives, etc. *East St. Louis Connecting Railway Co. v. O'Hara,* 282

Power of Employes to Contract Against Liability in Case of Death.—Exemption can not be secured by contract against liability for the consequences of gross negligence, or a willful act. *Maney v. C., B. & Q. R. R. Co.,* 105

Proof Required of the Exercise of Due Care.—As to the character of the proof required, of the exercise of due care on the part of an injured party, the true rule is, that where the circumstances attending an accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care; but where there is an entire absence of evidence of the conduct and acts of the deceased at the time of the accident or injury, that the party acted

RAILROADS. *Continued.*

with due care, can not be regarded as proven, because one conjecture is more probable than another. *Chicago & Alton R. R. Co. v. Crowder, Administratrix, etc.*, 154

Public Crossings.—Where a railroad constructed steps at the ends of its freight house platform, which was elevated three or four feet from the level of the ground, these steps being essential to the use of the freight house by its employes and the public, with whom it transacted business there, and being connected with no street, sidewalk, or other public way, the fact alone that the public used such steps in going to and from the freight and passenger depot, or for convenience used them to shorten the distance in going to and from different portions of the town, did not make them a part of a public crossing. *I. C. R. R. Co. v. Beard*, 232

Right to Expel Passengers for Violating Rules.—A street car company has the right to require of passengers the observance of all reasonable rules tending to promote the safety and convenience of passengers and the successful conduct of its business. So long as a passenger observes such rules a company is bound to carry him, but when he wantonly refuses to obey them, the company has the right at once to expel him, using no more force than may be necessary for that purpose. *Fort Clark Street Railroad v. Ebaugh*, 582

Rules—Sleeping Cars.—A rule of a railroad company requiring a passenger to have a first-class ticket for his transportation before he can be assigned to a berth in a sleeping car, is a reasonable one and can be legally enforced. *Pullman Palace Car Co. v. Lee*, 75

Rules and Regulations—Notice.—Where a street car company has adopted a rule against passengers riding on the platform, a request by the conductor that persons violating the rule shall come inside the car, in observance of the rule, should be complied with whether the person had notice of the rule or not. The conductor should have control of his car with the right to enforce all needed regulations and all reasonable requests made by him, with that end in view, should be obeyed by the passengers. *Fort Clark Street R. R. v. Ebaugh*, 582

Unlawful Discrimination.—To maintain an action against a railroad under the provisions of Chap. 114, Revised Statutes of Illinois, for an unjust discrimination, it is necessary to prove that the company has violated the provisions of said statute, and is guilty of an unjust discrimination to the damage of the party bringing the action in demanding, charging, collecting and receiving from him for the transportation and delivery of freight, a higher and greater rate of toll and compensation than it, at the same time, charged, demanded and received from others for the transportation and delivery of a like quantity of freight of the same class, from the same point in the same direction and over an equal distance of its railway. *Saritz v. O. & M. Ry. Co.*, 315

What is an Unjust Discrimination.—Where a railroad company fixed two rates on all coal transported over its road from points

RAILROADS. *Continued.*

between ten and fifteen miles from the city of East St. Louis to said city, one at forty-five cents per ton, and one at thirty-one and a quarter cents per ton, and both rates were public and uniform, and open to all coal shippers alike, and shippers knew at the time of shipments by them of the existence of such rates, and could have availed themselves of the lower rate, if they had seen fit to do so, *it was held*, that such rates did not amount to an unjust discrimination within the meaning of the statute. *Savitz v. O. & M. Ry. Co.*, 315

RATIFICATION.

What is, and What is Not.—Where a ditch, which benefited a number of land owners in common, was wrongfully constructed, and the person who constructed the same did so without the knowledge of one of the land owners so benefited, and afterward called upon said land owner, upon two different occasions, and asked for money for digging the ditch, and was refused, and more than a year afterward, called the third time upon such owner for money, and was given five dollars, *it was held*, that this act of the land owner, in the entire absence of any knowledge upon his part of the intended digging of the ditch, and where it was not done in his name, or for his benefit, was not such a ratification of the act of digging the ditch as would create a liability on the part of said land owner for the damage done by the ditch. *Reed v. Rich*, 262

REAL ESTATE BROKER.

Who is, Within the Meaning of an Ordinance Requiring a License.—B. resided at Rock Falls, and was engaged there in the real estate business. In the fall of 1890, he was occupied much of his time in Chicago, making his headquarters at the office of S. B., real estate brokers. He was interested with them in real estate deals in Indiana and elsewhere. He had no sign, desk or letter-head showing that he was engaged in the real estate business in Chicago. *It was held*, that the mere fact that he was interested with S. B. in deals concerning Chicago real estate, and made frequent trips to Indiana at their instance, etc., would not make him a real estate broker of Chicago, within the meaning of the ordinance. *Spear v. H. Bull*, 348

REAL ESTATE.

Clouds upon Title.—A judicial sale of real estate made under a void decree, and subsequent sales on redemption, are clouds upon the title of real property. *Boynton v. Holcomb*, 503

RECKLESSNESS.

Questions of—How Considered.—A question of recklessness must be considered with reference to the specific fact and conditions, as they existed at the time of the injury. It is not necessary, or even proper, to consider what might have happened to some other person at some other place on the track, by operating a car as was done at the time in question. *I. C. R. R. v. Beard*, 282

RECORDS.

Fatal Defects.—Where a record has fatal defects in not showing that the appeal was granted upon one of the days of the term of

RECORDS. *Continued.*

court from which it was taken the appeal will be dismissed. *Terhune v. Hill*, 257

In Appellate Court—Sufficiency of Clerk's Certificate.—Where a clerk's certificate does not show that the record filed contains any order or judgment of the court below, but only that it contains "all the paper designated, numbered from 1 to 52," it was held that the judgment and the order allowing an appeal are records and not papers; therefore, under the clerk's certificate, there was no judgment before the court for review. *Terhune v. Hill*, 257

REDEMPTION.

Effect on the Assignment of the Certificate of Sale, to the Owner of Equity.—Where the owner of an equity of redemption purchased and took an assignment of the certificate of sale, issued by the master in chancery, after the expiration of the statutory period allowed him for redemption, it was held, that such purchase and assignment did not inure to him as a redemption from the sale, and discharge of the debt, or affect the right of redemption under it by judgment creditors. *Boyn-ton v. Pierce*, 497

From Judicial Sales—Purchase of Master's Certificate.—Where an owner of an equity of redemption purchased, and took an assignment of the certificate of purchase, under the master's sale, it did not appear whether the purchase was before or after the expiration of the twelve months from the date of the sale, allowed him for redemption. It was held that the burden of proof was upon him to show that such purchase was within the twelve months, and not having done so, the court would assume that it was after, and, that being so, his title and right to redemption was entirely gone. *Boyn-ton v. Pierce et al.*, 497

Junior Creditors.—A junior creditor may redeem from a sale under the senior judgment, and cut off intervening liens. *Boyn-ton v. Pierce*, 497

The Right Favored in Law.—The right of redemption by the judgment creditor after the statute time given to the judgment debtor expires, is encouraged by law; it is a boon to the debtor, and pays his debts, which otherwise would remain unpaid, and is proper law. *Boyn-ton v. Pierce*, 497

Under Void Judicial Sales.—If a judicial sale is void, it follows as a logical sequence that a subsequent redemption by a judgment creditor and a sale under his judgment is void. *Boyn-ton v. Holcomb*, 503

REWARDS.

Burden of Proof.—A person claiming a reward for obtaining information concerning the identity of a thief, must show that he was the first to give the desired information, for if he was not the first to gain and import the information, he can not recover. *Higgins v. Lessig*, 459

Information Already Possessed.—In an action to recover the amount of a reward offered for information concerning the identity

REWARDS. Continued.

of a thief, it was competent for the defendant to show that the information given him, and for which the recovery was claimed, was in his possession before, and was not new to him. *Higgins v. Lessig*, 459

Contracts for.—A person having an old harness of the value of \$15 stolen, becoming much excited over the matter, exclaimed: "I will give \$100 to any man who will find out who the thief is, and I will give a lawyer \$100 for prosecuting him." *It was held*, that the language used, under the circumstances, did not show an intention to contract to pay the reward, but was in the nature of an explosion of wrath against the supposed thief, coupled with boasting and bluster about prosecuting him. *Higgins v. Lessig*, 459

Pursuit of Criminals.—When officers of the law, stimulated by a reward offered for the apprehension of a criminal, pursue such criminal from place to place, and finally locate him, and employ a local officer to make the arrest, such local officer is not entitled to the entire reward, on the ground that he made the actual seizure of the criminal. *Mahoney v. Whyte et al.*, 97

RIGHT OF ACTION.

When it Accrues.—Where a street has been cut down, and access to it is destroyed, and damage has resulted to the property, the right of action is complete. If the city designed in the continuance of the work to do any act that would lessen the damage, it should have offered to bind itself to do the act, so that the plaintiff might have an action in case of failure to do it. *City of Joliet v. Emma Blower*, 464

RULES OF COURT.

Advance Docket Fees.—Under a rule of the Circuit Court, providing that "whenever the appellant neglects to have the case docketed, the appellee may do so and obtain an order upon the appellant to pay the costs necessarily advanced, and upon failure to comply with the same, the appeal may be dismissed," it is error to require more than the fees fixed by law for costs necessarily advanced, for services performed or to be performed in the docketing of the case. *Hanford v. Hagler*, 258

Force and Effect.—The rules of court, when established, have the force of law. They are obligatory upon the court itself, as well as upon parties, and must be administered according to their terms while they remain in force. *Spain v. Thomas*, 249

Waiver.—The Appellate Court has no right to waive the enforcement of its rules, as a matter of favor, in any case, without granting the same indulgence in other cases, and thus suspend their operation altogether. *Spain v. Thomas*, 249

SALE AND DELIVERY.

Where there was a contract of sale, but the following facts relied upon as a delivery: Claimant was a creditor of his brother, against whom an attachment was issued. Shortly before the attachment was issued, he took some cattle to apply on his debt. He then pro-

SALE AND DELIVERY. *Continued.*

posed to take some horses, then in the pasture of a third party, at a figure which his brother thought too low, but next day sent his hired man to tell him that he could have them at the price mentioned. The creditor told the hired man he had no way to get them there, and the hired man said he would deliver them to him if he would pay him, etc. The hired man went to the pasture, took the horses, and started to deliver them, but on the way stopped at his employer's, the debtor brother, with the horses, intending to take them to the creditor brother next day, but while there, they were taken on the attachment. On the question of delivery, the court held that the law requires an open, visible change of possession, and that it would open a wide door to fraud if the law which requires a change of possession could be met by such proofs as these. The delivery was insufficient. *Watkins v. Petefish et al.*, 80

SCHOOLS.

Power of Trustees to Organize New Districts.—School trustees, under the act of the General Assembly, approved May 21, 1889, are authorized to organize new school districts out of territory belonging to two other districts, upon a petition signed by the legal voters (two-thirds in number) living within the boundaries of the proposed new district. *Purr et al. v. Miller et al.*, 48

SELF-DEFENSE.

How Much Force a Question of Fact.—The question of how much force a person may use in self-defense, and what he may do, is a question of fact for the jury, and not one of law for the court. *Hulse v. Tollman*, 490

Justification of an Assault—Threats.—The fact that a plaintiff had a revolver in his coat and a slung shot in his hip pocket, could not justify an assault upon him, unless he did some act indicating an intention to carry threats, previously made by him, into execution—such an act that would induce, in a reasonable person, a belief that there was immediate danger of his doing so. *Hulse v. Tollman*, 490

Provoking a Difficulty.—The law will not permit a person to provoke or bring on a difficulty with another and then avail himself of the plea of self-defense. *Hulse v. Tollman*, 490

Reasonable Belief—A Question for the Jury.—In an action of trespass where the right of self-defense is relied upon, the question, as to whether the defendant's belief that he was in danger was a reasonable one, is a question for the jury, and not for him to determine. *Hulse v. Tollman*, 490

SERVICE OF PROCESS.

Corporation.—To give justice's court jurisdiction to render a judgment against a corporation in attachment proceedings service must have been had either by leaving a copy of the writ with some of its officers, agents or employes, in accordance with the provision of Sec. 21, Ch. 79, R. S., or by posting notices and mailing a copy of such notice, addressed to the defendant at its place of residence, in com-

SERVICE OF PROCESS. *Continued.*

pliance with the requirement of Sec. 51, Ch. 11, R. S.; and where, in an attachment against the Andrews Opera Company, an officer in his return stated that he had "personally served the within writ, by reading to Frank Peckett and V. C. Hinman, garnishees, and by reading said writ to the within named defendant, G. W. Moody, C. W. Andrews," *it was held*, that a judgment rendered upon such services was void for want of jurisdiction. *Hinman v. Andrews Opera Co.*, 135

Partnership.—At the common law where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court by service of process. Actions against partnerships are instituted against the several persons composing the firm, and not against the firm as an entirety, distinct from its members. *Hinman v. Andrews Opera Co.*, 135

SET-OFF.

Where the evidence of a set-off is not disputed it is the duty of the jury to allow the same. *Fletcher v. Massey*, 86

SLANDER.

Allegations and Proof—Conversations.—In a declaration for slander, where the actionable words were alleged to have been spoken in the third person, the evidence showed them to have been spoken in the second person. *It was held*, that the allegations were not sustained by the proof. *Jacob Becker v. Bertha Schiller*, 606

Estoppel by Declaration.—Where, in an action for slander, the declaration alleges that the plaintiff was duly sworn before he gave the testimony for which he is charged with perjury, and the defendant pleads a justification, he can not be permitted to say that the averments of his declaration, which were necessary matters of inducement, and which are confessed by the plea, are untrue. *Becherer v. Stock*, 270

Evidence of Corrupt and False Swearing.—On the trial of an action of slander for the imputation of perjury, under a plea of justification, it is sufficient if the jury were justified in finding, from a preponderance of the evidence, that the testimony in question was given recklessly and positively without the knowledge of the facts, and if so, it was willful and corrupt according to the legal signification of these words. *Becherer v. Stock*, 270

Imputation of Perjury—Evidence That the Person was Sworn.—On the trial of an action for slander for imputing perjury, to sustain the issues, the plaintiff offered a bill of exceptions made in the suit in which it was claimed the perjury was committed. The opposite party admitted that the evidence in question was correct, and that he swore to it as set forth therein, and consented that it might be read to the jury. *It was held*, that as the party admitted he swore to it as set forth in the bill of exceptions, and as the bill of exceptions introduced in evidence, shows that he was sworn and testified, it is sufficient proof to show that the person was duly sworn before giving his testimony. *Becherer v. Stock*, 270

SLANDER. *Continued.*

Plea of Justification—Materiality of Evidence.—On a trial of an action of slander for imputing perjury, under a plea of justification, it appeared that the testimony alleged to be false, was given in a prior suit for work, labor and services, and was to the effect that one person had worked for another for five years, earning a good hired hand's wages, and that the services of a hired hand, at that time and in that neighborhood, were worth from fifteen to eighteen dollars a month. *It was held*, that if no other testimony had been offered on that trial, this of itself would have been sufficient to establish a liability under the pleadings for the amount shown, and hence the evidence was material to the issue. *Becherer v. Stock*, 270

SPECIAL FINDINGS.

Conclusive.—Where, upon a trial at law, the evidence is conflicting upon a material part in the case, and the jury, in response to a special interrogatory, return a finding, it will be conclusive upon that question. *E. St. L. Con. Ry. Co. v. O'Hara*, 282

Personal Injuries—Willful Commission of Injuries Complained of.—Where, in a suit against a railroad company for personal injuries, the evidence disclosed the facts that at a place within the limits of a city, large numbers of persons were in the habit of crossing the track, and the ordinances of the city required that the bell of the locomotive engine of railroad companies should be continuously rung while running within the city, and when running in the night time, a bright and conspicuous light should be kept at the forward end of the locomotive, or if backing at the rear end of the same, so as to show the direction in which the same was moving, and prohibiting the running, within such limits, of any passenger car or train at a greater rate of speed than ten miles, and freight trains at six miles an hour. There being evidence that warranted the finding of the jury that no bell was rung at said place, and no headlight on the engine to disclose the direction in which it was moving in passing along the railroad track at said place, it would be sufficient evidence, coupled with the rate of speed, to warrant a special finding, by the jury, that the servants and agents of the railroad company willfully committed the injuries complained of. *E. St. L. Con. Ry. Co. v. O'Hara*, 282

STATUTES.

Application of the Pauper Act.—Section 18 of chapter 107, R. S., entitled "Paupers," providing that in towns containing 4,000 inhabitants or over, the county board may, upon the written request of the supervisors, appoint an overseer of the poor, etc., applies only to ordinary towns having 4,000 inhabitants or over, and not to towns organized out of the territory of a city under Sec. 1 of the act of May 23, 1877. *Board of Supervisors v. The People*, 369

Construction of Mines, Surveys and Plats.—The statute authorizing a survey of lands adjacent to mines upon a complaint being made, simply gives legal authority to go upon the premises and make the survey, which otherwise would be a trespass. The proceedings

STATUTES. *Continued.*

are in the nature of a search warrant. It requires no record, plat or report to be made of such survey, and if the same are made they are not admissible in evidence without proof of their accuracy. *Monmouth Mining & Mfg. Co. v. Regmier*, 385

Constructions of—Prior Statutes Applicable to this Court.—The statute provides that no judgment shall be reversed in the Supreme Court for mere error in form, if it be for the true amount of indebtedness or damages. There is no doubt that this act, although enacted before the organization of the Appellate Court, is sufficiently broad in its scope and elastic in its terms to include any courts thereafter to be created, and given part of the functions which were to be exercised by the Supreme Court when the enactment went into operation. *Coats v. Burkett*, 275

Different Provisions to be Construed Together.—Where the provisions of different statutes pertain to the same subject and have but one aim and object in view they must be construed together into one entire system, as if enacted into a single act, and, so far as it can reasonably be done, each provision given force and effect. *Board of Supervisors v. The People ex rel.*, 369

Repeal and Saving Clauses.—Where a statute is repealed without any saving clause, as to all proceedings pending under it, except such as are past and closed, it must be considered as if the statute had never existed. *Boynton v. Holcomb*, 503

Right to Appoint a Poormaster.—The city of Moline, having been organized into a town, having over 3,000 inhabitants, under Sec. 1 of the act of May 23, 1877, entitled, "An act to authorize county boards in counties under township organization, to organize certain territory situated therein as a town," has the legal right to appoint the poormaster of such town, and it would seem within the spirit of the statute, that he should give a bond to the town, conditional for the faithful discharge of his duties, although there is no express provision of the statute requiring him to do so, and that the city clerk should approve it. *Board of Supervisors v. The People*, 369

SUPERVISORS.

Power to Approve the Bond of Poormaster.—Where a poormaster is appointed by a city council for a town, organized out of a part of the territory of the city, under the act of May 23, 1877, the duty of approving his official bond does not devolve upon the board of supervisors of the county. *Board of Supervisors v. The People*, 369

SURETY.

Release by Extension of Time.—M. borrowed from B. \$600, for which he gave a note, payable in one year, with interest at the rate of eight per cent per annum, payable semi-annually, with R. as security. When the note became due, B. extended the time of payment for six months, M. agreeing to retain the money and pay interest at the rate provided in the note. Like extensions were subsequently made every six months, with the consent of R., until November, 1886, after which, extensions were made without his

SURETY. *Continued.*

knowledge. The last extension was made May 23, 1888. Suit was brought on the note one year afterward, and R. pleaded specially the extension of payment without his consent and consequent release from liability. *It was held*, that such an extension did not have the effect of releasing R. from his liability as security on the note.

Barnard v. Reynolds,

596

SURVEYS AND PLATS.

Mines.—The object of Sec. 2, Chap. 94, R. S., entitled mines, is to obtain evidence as to whether mining operations are being carried on under or on the premises of an adjacent owner. When this object is attained, the duties of the surveyor, or appointee of the court, ceases. The surveyor may be a witness and make a plat explanatory of his survey, and the owner may introduce in connection the oath of a witness showing its accuracy the same as other plats are introduced in evidence. *Monmouth Mining and Manufacturing Company v. Regmier,*

385

TACKING POSSESSIONS.

Priority of Liens—Executions and Chattel Mortgages.—An officer had two executions in his hands and with them went to the store of the defendants, and, entering, announced that he levied upon the goods. He then left the store for a short time. During his absence the defendants made an assignment for the benefit of the creditors and delivered it to the assignee who took possession of the goods and posted a notice to that effect. When the sheriff returned he had a chattel mortgage under which he sought to take possession of the goods. *It was held*, that the assignee's claim to the property was prior in point of time to that of the sheriff as agent for the collection of the mortgage, and in case one possession could be tacked on to another at the termination of the first, the assignee would have the first right under the deed of assignment, as he made the first attempt to gain such possession from the sheriff. He was therefore ahead in priority of time and the mortgage claim could gain no additional rights by being placed in the hands of the sheriff who held the execution. *Mann v. Reed,*

406

TENDER.

Of Amount Due and Costs.—In an action upon an account, the defendant tendered to the plaintiff the sum of fifty-one dollars and thirty-six cents, as the amount due and costs which had been made up to the time of the tender; on the trial the plaintiff recovered judgment against the defendant for fifty dollars and thirty-six cents court costs. Upon appeal, *it was held*, the tender having been kept good, it was sufficient, and that the judgment against the defendant for fifty-one dollars and thirty-six cents and for the costs was erroneous. *Hollenberg v. Tompkins,*

323

THREATS.

When Competent.—In an action for trespass for personal injuries, threats of the plaintiff are only competent to be considered in case the jury believe he made a hostile demonstration at the time of the

THREATS. Continued.

assault, indicating danger to the defendant. Threats can only be considered for the purpose of giving character or coloring to some act of the plaintiff, and to aid the jury in determining whether the defendant acted from a reasonable fear of an assault upon him.

Hulse v. Tollman,

490

TORTS.

Principal—When Bound—Ratification.—In order that a principal may be bound, a tort (*e. g.*, a trespass) must, at the time when committed, have been intended to be done on behalf and for the benefit of the principal, or, as it is sometimes expressed, in the name of and avowedly for the benefit of the principal. *Reed v. Rich*, 262

Ratification and Adoption.—An action will lie against every person who has ratified and adopted an act of imprisonment, effected or ordered by his servant or agent, for his use and benefit, although the imprisonment was effected, in the first instance, without his knowledge. *Reed v. Rich*,

262

Recovery Against Joint Trespassers.—In an action of trespass against several defendants, jointly, unless the evidence shows a joint act on their part, a joint recovery against them can not be sustained. *Thompson v. Evans*,

289

Subsequent Approval of a Wrong Act.—The approval of a wrongful act, already committed, is no subject of punishment. Subsequent approval of a trespass will not affect a third person, unless the acts were done in his name and for his use. If the trespass was done for his use or benefit, or if he is not in a situation to have intended the act, then his subsequent assent does not make him a trespasser. *Reed v. Rich*,

262

TRESPASS.

To Real Estate—Highways.—When a person fences in a part of the highway he is liable to a penalty, and the fence as an obstruction may be removed by the public officials or by a private citizen. *Green v. Stevens*,

24

Ratification.—A person who agrees to a trespass after it is committed is, in law, not a trespasser, unless the trespass was done for his use or for his benefit, and then the agreement subsequently made amounts to a precedent command. *Reed v. Rich*,

262

What Acts are Sufficient to Create Joint Liability.—The mere expression of an opinion by the city attorney as to the duty of another officer under the ordinance, and in the absence of the proof of malice, a mistakenly expressed opinion will not authorize the recovery of damages against him for acts committed by the other officer, in pursuance of such opinion. So, where a person erected a shed within the fire limits of a city, and the city attorney, being called upon for his opinion in regard to the matter, expressed it that the building was erected in violation of the ordinance, and that it would be the duty of the marshal to tear it down if the person erecting it did not remove it, and the marshal having torn it down, *it was held*, that the city attorney, by reason of the opinion given, was not jointly liable

TRESPASS. *Continued.*

in trespass with the marshal, no malice being shown. *Thompson v. Evans*, 289

TRIALS.

By the Court—Conduct of, etc.—It is entirely proper for the trial court, in ruling upon objections to evidence, to give his reasons for his holding, being always guarded against saying anything in the presence of the jury prejudicial to either litigant. *Staver & Abbott Mfg. Co. v. Coe*, 428

By the Court—Conflict of Testimony.—Where there is a conflict of testimony in a trial by the court without a jury, it is the peculiar province of the court to decide the controversy between the parties, and such decision will not ordinarily be disturbed. *Sharp et al. v. Babcock*, 404

Exceptions to Ruling.—Where a court, in trying a case without a jury, hears evidence subject to objections, an exception to the ruling of the court must be preserved in some appropriate manner before the Appellate Court can be called upon to review the decision. *Hollenberg v. Tompkins*, 823

Holdings—Exceptions—Questions of Law.—Where a case is tried by the court below without a jury, and no motion for a new trial made, or propositions of law submitted to or passed upon by the trial court, the Appellate Court can not pass upon questions of law involved in the controversy. *Spain v. Thomas*, 249

Objections—Exceptions and Propositions of Law—Powers of the Appellate Court.—Where a case is tried by the court, and no exception is taken to any material ruling of the court in admitting evidence, or in hearing the same, subject to objection, and where no propositions of law are presented for the purpose of obtaining an expression of the views of the law entertained by the court, but an exception is taken to the finding of the court on the main question at issue, the Appellate Court can only inquire into the sufficiency of the evidence to support the finding and judgment. *Hollenberg v. Tompkins*, 823

USURY.

Taking Interest in Advance.—A lender of money may retain his interest in advance and deduct it from the principal sum loaned without being liable to the charge of taking usurious interest. *Maxwell v. Willett*, 564

VARIANCE.

Pleading and Evidence.—It is a general rule that an objection on the ground of a variance between the pleadings and the proofs must be specific and must set out the ground relied upon, so that the plaintiff may avoid the objection by an amendment. *Ohio & Mississippi Ry. Co. v. Brown*, 40

VENDOR AND VENDEE.

Possession of Goods by Fraud—Execution Debtor.—Where a merchant who is insolvent obtains possession of goods under a pretense of purchase by means of fraud and fraudulent representations as to his

VENDOR AND VENDEE. *Continued.*

financial condition, and with no intention to pay for them, title does not pass between them, and the vendor may recover possession of the goods in replevin, if they have not passed into the hands of a *bona fide* purchaser. Such title does not extend to an execution debtor; he does not stand in the sense of an innocent purchaser, but is a mere lienor who takes title subject to all the infirmities existing between the vendor and the fraudulent vendee. *Staver & Abbott Mfg. Co. v. Coe*, 426

Fraud—Recovery of Goods—Intention.—To sustain a recovery of the goods by the vendor, it must appear that the vendee at the time of going through the forms of a purchase, entertained a positive intention not to pay for them. It is not a fraud for a purchaser to buy on credit when he is insolvent. He may even conceal the condition of his liabilities, if he buys with an honest intention, and if he does so with a belief that his affairs will so improve as to enable him to get through his embarrassment, the purchase will stand. *Staver & Abbott Manufacturing Co. v. Coe*, 426

VENUE.

Change of—Affidavits.—Plaintiff made a motion in the County Court for a change of venue, basing his motion upon a supposed prejudice of the inhabitants of the county, stating as his ground, certain derogatory articles published in the county newspaper of the adjoining county. In support of his petition he filed the affidavits of fourteen citizens of the county, all of whom stated, that, in their belief, plaintiff in error could not have a fair trial in the county, etc. The state's attorney filed six counter affidavits, the affiants in which were of the opinion that there was not any prejudice in the minds of the inhabitants, against the defendant, that would prevent him from receiving a fair trial. The County Court overruled the motion for a change of venue. *It was held*, by the Appellate Court, upon examination of the affidavits, that the County Court was justified in overruling the motion. *McDonald v. The People*, 857

VERDICTS.

Dramshop Act.—In a suit brought under the Dram Shop Act, the jury returned the following verdict: "We find the defendants guilty as charged in the declaration, and assess plaintiff's damages at \$5,000; \$1,500 to Sarah Bell and \$700 each to Lucinda Bell, Hugh Bell, Mary Bell, Sarah Bell and John Bell. *It was held*, no objection having been taken to it in the trial court, that the form of the verdict was not injurious to the defendants; it was in the gross sum of \$5,000, and the finding of the jury as to how it should be distributed between the plaintiffs did not concern the defendants. *Helmuth v. Bell*, 626

When Evidence to Support.—Where there is evidence to support the finding of the jury, it will not be disturbed. *Youle v. Brown*, 102

Justified by the Evidence.—Where the evidence justifies the verdict, a judgment rendered upon it, will be affirmed. *Bick & Glann v. Collins & Martly*, 861

VERDICTS. *Continued.*

Objection to Form.—Technical objections to the form of a verdict and judgment can not be made in the Appellate Court for the first time. *I. C. R. R. Co. v. The People*, 538

VESTED RIGHTS.

Violation of Ordinances—Defective Records.—The record of a village board did not show at the time an ordinance was violated that it had been passed by the affirmative vote of a majority of the board. but the record was subsequently amended so as to show the fact. *It was held*, that the person violating the ordinance was presumed to have known that the law authorized the board to amend its record, and he could acquire no vested right that the prosecution for his wrongdoing should be governed by the record in its incomplete form. When he undertook to violate the ordinance, because he thought that the village would not be able to prove its passage, he took the risk of such proof being made and had no right to insist that it should not be made. *Village of Gilberts v. Rabe*, 418

WAIVER.

Of Limitations.—Where a policy of insurance contained a limitation upon the right to sue, and the company, within the period so limited, requested the assured not to sue, and its president represented that the company was not then able to pay, but would be after awhile, and if the assured would wait, he should be paid, and he did wait, *it was held*, that by such acts, the company had waived its right to rely upon the limitation. *Illinois Live Stock Ins. Co. v. Baker*, 92

WATERS.

Damage from Overflow—Responsibility.—Where a person leased water power from the authorities of the Illinois and Michigan canal, and for the purpose of making more power was permitted by the canal authorities to put flash boards on top of a dam in the Desplaines river, under the direction of the canal superintendent, thereby raising the water in the river and overflowing an island used for garden purposes, causing damages to the crop growing, *it was held*, that the company was not relieved of its responsibility by the consent of the canal authorities. *Economy Light & Power Co. v. Cutting*, 422

WILLS.

Construction.—It is a familiar rule of construction that a testator is presumed to dispose of all his estate, and it has been said that the idea of any one deliberately proposing to die testate as to a portion of his estate, and intestate as to another portion, is so unusual in the history of testamentary dispositions, as to justify almost any construction to avoid it. *Hayward et al. v. Loper et al., Executors, etc.*, 53

Construction, etc.—Intention of the Testator.—The intention of the testator must prevail and govern, and all mere rules of construction must give way to such intention, unless it is absolutely inconsistent with some settled rule of law. *Kelly v. Gonce*, 82

WILLS. *Continued.*

Evident Intention Must Prevail—Omissions, etc.—If a testator overlooks an event which he would have probably provided against, had it occurred to him, it is not the province of the court to supply the omission by implying or inserting a clause disposing of his property, according to some supposed or probable intention of the testator. *Kelly v. Gonce*, 82

Intention of the Testator—Estates.—The intention of the testator is to be gathered from the language of the will, which is to be read in the light of the well and long-established rule, that in the absence of a clear manifestation of the intention to the contrary, estates shall be held to vest at the earliest period. *Kelly v. Gonce*, 82

Residuary Legatees—Presumption.—A testator in his original will made provision for his wife and then made the following specific bequests: To his daughter Lodusky, \$3,000; to his daughter Leni, \$1,300; to his son, Cruce V. Loper, one dollar; to his granddaughter Nellie W. Sherman, \$1,500; to his granddaughter Dellie M. Sherman, \$1,500; and then directed that all the residue, together with the wife's portion at her death, be divided into three equal shares or parts, and given as follows: One of said equal shares or parts to Gideon B. Loper, one to Ophelia Loper, and one to Adriana Loper, thus disposing of the entire estate. By a codicil he recited in detail the provisions of the original will, by which he disposed of the residue of his estate, in equal parts, to Gideon B. Loper and his two daughters, Ophelia and Adriana, and then declared that the share of Gideon B. Loper be reduced the amount of \$5,000, the share of his daughter Ophelia be reduced the amount of \$8,000, and the share of his daughter Adriana be reduced \$3,600. This codicil made no disposition of these reductions. The reasonable presumption is that after the making of the original will the testator disposed of a portion of his estate and gave such portion or its proceeds to the residuary legatees, in the unequal amounts mentioned in the codicil, and that the reductions there stated were to be considered only as between the recipients of his bounty, in equalizing their shares in the residue, and that he had not intended to withdraw the aggregate from them, and leave it undisposed of. *Hayward v. Loper*, 53

WITNESS.

Competency—Age.—Where it appeared from her examination that a girl of thirteen understood that pains and penalties were attached to the crime of perjury and had the moral perception of a girl of that age, it was held error to exclude her from testifying, on the ground that she did not understand the nature of an oath. *McAmore v. Wiley*, 615

Competency—Intelligence.—The question of the witness' intelligence, goes more to his credibility, than to his competency as a witness. His knowledge or want of it may be taken into consideration by the jury in determining the weight to be given to his testimony. *McAmore v. Wiley*, 615

WITNESS. Continued.

Leading Questions.—Where a witness is manifestly unwilling to testify it is not error to allow the party calling him to ask leading questions. *McDonald v. The People*, 357

Religious Tests.—No religious tests are now required to qualify a person to be a witness, under the constitution of the State of Illinois. *McAmore v. Wiley*, 615

Separation of.—The matter of separating the witnesses and excluding them from the court room until called to the witness stand, rests entirely within the discretion of the trial court, and the Appellate Court will not inquire as to whether the discretion was judicially exercised. *Staver & Abbott Mfg. Co. v. Coe*, 426


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